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No. 93-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLSTATE LIFE INSURANCE CO.,
An Illinois Corporation, et al.,

Petitioners,

vs.

LINTER GROUP LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth of Australia, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the doctrine of forum non conveniens, is the choice of a United States citizen or resident to sue in a United States court entitled to greater deference than the choice of a foreigner, and if so, did the court below err when it failed to give such deference and dismissed petitioner's lawsuit, in favor of Australia, where plaintiffs engaged in no conduct outside the United States and are suing as a result of misrepresentations and omissions made in the United States in connection with the public offer and sale in the United States of registered securities?

2. Did the court below err when it determined that the instant actions should be dismissed on the ground of comity in favor of liquidation

proceedings in Australia where (i) it is undisputed that there is no requirement under Australian law that the claims asserted in this action be tried by the court overseeing the liquidation, (ii) it is undisputed that such claims will not be tried by that court, but by an ordinary trial court, and (iii) it is undisputed that Australian law does not stay foreign lawsuits such as this action and that, to the contrary, the court overseeing the winding-up, applying uncontroverted Australian law, has expressly held that petitioners are entitled to prosecute their actions in the United States?

THE PARTIES BELOW:

Petitioners:

ALLSTATE LIFE INSURANCE CO., An Illinois Corporation, ARIEL CAPITAL II L.P., A Delaware Limited Partnership, ARIEL FUND LTD., A Cayman Island Exempt Corporation, CARMEL FUND LTD., A Cayman Island Exempt Corporation, CARMEL PARTNERS L.P., A Delaware Limited Partnership, COLONIAL DIVERSIFIED INCOME FUND, A Massachusetts Corporation, D & P CBO PARTNERS L.P., A Delaware Limited Partnership, EXECUTIVE LIFE INSURANCE CO., A California Corporation, ITHACA PARTNERS L.P., A Delaware Limited Partnership, LIFE INSURANCE CO. OF THE SOUTHWEST, A Texas Corporation, MT. TAVOR PARTNERS, L.P., A Delaware Limited Partnership, PROSPECT STREET HIGH INCOME PORTFOLIO, INC., A Massachusetts Corporation, PROSPECT INTERNATIONAL HIGH INCOME PORTFOLIO, N.V., A Netherlands Antilles Corporation, UNITED HIGH INCOME FUND INC., A Maryland Corporation, UNITED HIGH INCOME FUND II INC., A Maryland Corporation, UNITY MUTUAL LIFE INSURANCE CO., A New York Corporation.

Respondents:

LINTER GROUP LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In

The Commonwealth of Australia, LINTER TEXTILES CORPORATION LIMITED, A Wholly-Owned Subsidiary Of The Linter Group, A Limited Company Incorporated Under The Laws Of The State of New South Wales In The Commonwealth Of Australia, APPUNGA PTY. LIMITED, A Private Company Incorporated Under The Laws Of The Northern Territory, Australia, BRADMILL TEXTILES LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, BRADMILL WORKWEAR PTY. LIMITED, A Private Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, FORMFIT HOLDINGS LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, HILTON HOSIERY COMPANY LIMITED, Formerly Known As Australian Consolidated Hosiery Limited, A Limited Company Incorporated Under The Laws Of The Northern Territory Of Australia, JACQUARD FABRICS AUSTRALIA LIMITED, Formerly Known As Jacquard Fabric Holdings Limited, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, KING GEE CLOTHING COMPANY, A Limited Company Incorporated Under The Laws Of the Northern Territory, Australia, KORTEX AUSTRALIA (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, KOTRA LIMITED, A Limited Company Incorporated Under The Laws Of the Northern Territory, Australia, NATIONAL TEXTILES

LIMITED, A Private Company Incorporated Under The Laws Of The State Of Victoria In The Commonwealth Of Australia, PELACO AUSTRALIA (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, SPEEDO GROUP LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, SPEEDO KNITTING MILLS PTY LIMITED, A Private Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, SPEEDO INTERNATIONAL B.V., A Limited Company Incorporated Under The Laws Of The Netherlands, STUBBIES CLOTHING COMPANY LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, TORONTO FASHIONS (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, TERRY AHERN, An Individual, JOHN WILSON BLOOD, An Individual, KATHY R. BOSKOWITZ, An Individual, RONALD M. DEANS, An Individual, ZEV FURST, An Individual, DAVID GALE, An Individual, ABRAHAM GOLDBERG, An Individual, MILES RICHARD GOWTY, An Individual, J.C.M. TABBERS, An Individual, LINDSAY PHILLIP MAXSTED, Receiver And Manager Of Linter Group Limited And Linter Textiles Corporation Limited, JOHN BERESFORD HARKNESS, Receiver And Manager Of Linter Group Limited And Linter Textiles Corporation Limited, COMMONWEALTH BANK OF AUSTRALIA, BANK OF NEW ZEALAND, SUMITOMO INTERNATIONAL FINANCE AUSTRALIA LIMITED, CHASE AMP

BANK LIMITED, BARCLAYS BANK AUSTRALIA LIMITED, STATE BANK OF SOUTH AUSTRALIA, SECURITY PACIFIC AUSTRALIA LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED and WESTPAC BANKING CORPORATION.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 2, 1993.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF COURTS BELOW

Allstate Life Insurance Company, et al. v. Linter Group Limited, et al., 994 F.2d 996 (2d Cir. 1993); [1992-1993] Fed. Sec. L. Rep. (CCH) ¶ 97,317 (S.D.N.Y. 1992); [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,864 (S.D.N.Y. 1992);

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[1]Pursuant to Rule 29.1 of the Supreme Court Rules, the publicly traded corporate parents, subsidiaries, and affiliates of petitioners are as follows: First Executive Corp., Duff & Phelps, Inc. and Sears, Roebuck & Co.

782 F.Supp. 215 (S.D.N.Y. 1992).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by petition for writ of certiorari to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1) for the review of a final judgment, dated June 2, 1993, which affirmed the dismissal of two related actions, Allstate Life Insurance Company, et al. v. Linter Group Limited, et al., 91 Civ. 1655 (RPP) ("Linter I"), and Allstate Life Insurance Company, et al. v. Linter Group Limited, et al., 91 Civ. 2378 (RPP) ("Linter II").

Jurisdiction of the District Court in both actions was premised upon 28 U.S.C. § 1331 and 28 U.S.C. § 1332(a)(3). In Linter I, jurisdiction was also premised upon Section 20 of the

Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77v, and Section 27 of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78aa. In Linter I, plaintiffs alleged violations of Sections 11, 12(2) and 17(a) of the 1933 Act, 15 U.S.C. §§ 77k, 771(2) and 77q(a), Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, as well as assorted state law claims. In Linter II, petitioners alleged violations of Section 10(b) of the 1934 Act and Rule 10b-5, and premised jurisdiction upon Section 27 of the 1934 Act.

In addition, petitioners were citizens of different states and/or subjects of a foreign state, the defendants were citizens and/or subjects of a foreign state, and the matter in

controversy exceeded the sum of $50,000.00.

RELEVANT STATUTES

Securities Act of 1933, Sections 11, 12(2), and 20, 15 U.S.C. §§ 77k, 77l(2), and 77v, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, 15 U.S.C. § 78j(b) and 17 C.F.R. 240.10b-5, and Section 27, 15 U.S.C. § 78aa, the text of which are set forth in the Appendix submitted herewith.

STATEMENT OF THE CASE

Both Linter I and Linter II arise from the sale, on or about October 13, 1988, of subordinated debentures (the "Debentures") pursuant to a public offering that occurred solely in the United States (the "Public Offering"). The Debentures were issued by Linter

Textiles Corporation Limited ("Linter Textiles"), pursuant to a trust indenture (the "Indenture"), and were registered with the United States Securities and Exchange Commission (the "SEC" or the "Commission"). A prospectus, dated October 6, 1988 (the "Prospectus"), was sent to investors in the United States.

The complaints in both actions allege that the Prospectus was materially false and misleading. It failed to disclose the existence of certain guarantees by Linter Textiles to its parent, Linter Group Limited ("Linter Group") that were prohibited by the Indenture. Although, without the guarantees, Linter Textiles was at all times a profitable company, within two years it was forced into insolvency when its guarantee obligations to Linter Group

became due, and it was thereafter liquidated.

In Linter I, petitioners asserted claims against Linter Textiles, Linter Group, Linter Textiles' directors (the "Linter Textiles Directors"), subsidiaries of Linter Textiles (the "Linter Subsidiaries"), certain directors of the Linter Subsidiaries,[2] and the liquidators of the Linter Companies, Lindsay Philip Maxsted ("Maxsted") and John Beresford Harkness ("Harkness") (together with Maxsted, the "Liquidators"), under the 1933 Act and the 1934 Act, as well as under state law.

In Linter II, brought against Linter

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[2]Those directors of Linter Subsidiaries not also directors of Linter Group or Linter Textiles were dismissed without prejudice, by stipulation, as was one individual listed in the Prospectus as a Linter Textiles director, Sir Max Dillon.

Group, Linter Textiles, the Liquidators, and nine Australian Banks (the "Bank Defendants"), the complaint alleges that the Bank Defendants knowingly acted in concert with the Linter defendants, aided and abetted, and conspired with them to defraud investors, and asserts a claim under Rule 10b-5.

Petitioners commenced the Linter I action on March 8, 1991 and Linter II on April 26, 1991. The Bank Defendants in Linter II responded first, moving to dismiss the complaint. Four of the banks moved to dismiss for lack of personal jurisdiction; all of the Bank Defendants moved on the ground of forum non conveniens.

While the Bank Defendants' motion in Linter II was pending, certain defendants in Linter I moved to dismiss that action.

The Liquidators and the Linter Companies moved to dismiss or stay Linter I based upon the existence of ongoing liquidation proceedings in Australia. Certain defendants moved to dismiss for lack of personal jurisdiction. All of the Linter Company defendants in Linter I moved to dismiss on the ground of forum non conveniens.

Two individual defendants in Linter I served answers, pro se, but did not move to dismiss. Another defendant, did not appear.

In an opinion dated January 9, 1992, the district court denied the motion of the Bank Defendants to dismiss in Linter II. The court determined that it possessed personal jurisdiction over the four moving banks, and it also determined that the Bank Defendants had not met

their burden of showing that petitioners should be deprived of their choice of forum. On February 14, 1992, the Bank Defendants served answers in Linter II in which they asserted cross-claims for contribution and indemnity against Linter Group and Linter Textiles, and discovery thereafter proceeded against the parties and against the law firm of Skadden, Arps, Slate, Meagher & Flom ("Skadden, Arps"), which acted as counsel to Linter Textiles in connection with the Public Offering.

On June 1, 1992, the district court issued an opinion and order granting the Linter Defendants' motion to dismiss. The court determined that it possessed personal jurisdiction over all of the defendants, but it dismissed the action on the ground of comity in view of the

fact that the Linter Companies are in the process of liquidation in Australia. The court dismissed the entire action, including not only claims asserted against the Linter Companies, but also, without explanation, those against individuals who are not parties to any liquidation proceedings in Australia and, in addition, against defendants Deans, Ahern and Boskowitz, who had not moved to dismiss. Judgment was entered on June 8, 1992.

On June 22, 1992, petitioners moved in Linter I to amend the judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. While this motion was pending, on August 5, 1992, the Bank Defendants made a second motion to dismiss Linter II, premising their motion on the purported change in

circumstances precipitated by the district court's dismissal of Linter I. On August 7, 1992, Linter Textiles, Linter Group and the Liquidators also moved to dismiss Linter II as to them on the grounds of comity. On September 4, 1992, the district court denied petitioners' motion to amend the judgment in Linter I. Petitioners filed their notice of appeal to the United States Court of Appeals for the Second Circuit in Linter I on September 30, 1992. By stipulation, the appeal was dismissed without prejudice, and then reinstated by petitioners on December 17, 1992.

On December 22, 1992, the district court reversed its first Linter II decision and granted the motion of all respondents to dismiss Linter II. Judgment was entered on January 4, 1993.

Petitioners filed their notice of appeal on January 12, 1993. Linter I and Linter II were then consolidated for purposes of appeal.

On June 2, 1993, the Second Circuit entered its judgment affirming the district court's dismissal of both Linter I and Linter II. In reaching its decision, the court below determined that the district court in Linter I did not abuse its discretion when it dismissed petitioners' action against the Linter Companies in purported deference to the liquidation proceedings in Australia, and that the same comity considerations warranted dismissal as to the individual defendants as well.

With respect to Linter II, the court similarly determined that the district court did not abuse its discretion in

dismissing Linter II against the Bank Defendants on the ground of forum non conveniens.

STATEMENT OF FACTS

A. Identification Of The Parties.

Petitioners, who brought both actions in their individual capacities, are institutional investors who maintain their principal place of business in the United States. Petitioners include two insurance companies and five publicly traded mutual funds. Petitioners were purchasers of the Debentures issued pursuant to the Public Offering.

In connection with the purchases at issue, petitioners transacted no business in Australia, and did not have even minimum contacts with that country. The Debentures were registered with the United States Securities and Exchange

Commission (the "SEC"), were offered for sale only in the United States, by a United States underwriter, Drexel Burnham Lambert ("Drexel"). The Debentures were delivered for purchase in New York, New York, and were issued pursuant to the Indenture that named a United States indenture trustee, U.S. Trust Company ("U.S. Trust").

Linter Group and Linter Textiles are limited companies incorporated under the laws of the State of New South Wales, Australia. At all relevant times, Linter Group was a holding company owning a number of subsidiaries, including Linter Textiles, which was itself, a holding company that owned the Linter Subsidiaries.

Linter Textiles was formed as part of a reorganization of Linter Group.

Effective June 30, 1988, Linter Textiles acquired all of Linter Group's core textile and apparel businesses. In this manner, Linter Group's textile and apparel businesses were to be segregated from Linter Group's other businesses and thus free of the parent company's debt.

Within two years, all of the Linter Companies became insolvent, and were thereafter placed into liquidation by order of the Supreme Court of New South Wales, Australia. The Linter Companies have been liquidated, and they now consist essentially of a large pool of cash awaiting distribution to creditors.

Maxsted is the liquidator of Linter Group, and he and Harkness were appointed joint liquidators of the remaining corporations. The individual defendants were officers and/or directors of Linter

Textiles.

There are nine Bank Defendants in Linter II. Five of the nine banks maintain offices in New York. The remaining four Bank Defendants are subsidiaries of large, multinational banking organizations that also maintain headquarters in New York City.

B. Facts That Form The Basis Of Plaintiffs' Complaints.

The facts which form the basis of the petitioners' complaint, and which were corroborated during discovery, clearly indicate that a gross fraud was perpetrated upon United States investors by means of the Public Offering. The agreements which form the basis of the complaints are not, and cannot be disputed. Indeed, the fraud was memorialized in express, written contracts, the authenticity of which has

not been denied, which were produced by each of the Bank Defendants from its files.

The fraud complained of arises out of the guarantee of loans to Linter Group. Each of the Bank Defendants had loans outstanding to Linter Group (the "Linter Group Debt") which were secured by a negative pledge agreement pursuant to which each of the Linter Subsidiaries guaranteed the Linter Group Debt (the "Original Guarantees"). At the time of the Public Offering, the Linter Group Debt totalled A $323,000,000, all of which was guaranteed by the Linter Subsidiaries.

Linter Textiles and Drexel would not have been able to sell the subordinated Debentures if the Prospectus had disclosed that Linter Textiles' operating

subsidiaries had senior liabilities totalling A $323,000,000, or if the Linter Subsidiaries were permitted to guarantee the Linter Group Debt. Indeed, Linter Textiles was established to create a debt-free entity able to raise fresh capital. Accordingly, provisions were written into the Indenture ostensibly prohibiting such guarantees, even though, unbeknownst to investors, such guarantees were already in place pursuant to the negative pledge agreement.

To evade the strictures of the Indenture and to avoid disclosing the existence of the Original Guarantees to United States investors, Linter Group proposed a transaction to the Bank Defendants in mid-September, 1988. The Bank Defendants agreed, as "Stage I," that prior to the Public Offering, they

would release all of the Original Guarantees by the Linter Subsidiaries of the Linter Group Debt. In turn, Linter Group and Linter Textiles agreed, as "Stage II", that within 30 days of the Public Offering, Linter Textiles would issue a replacement guarantee to the Bank Defendants of the Linter Group Debt, and that the Linter Subsidiaries would guarantee the replacement guarantee of Linter Textiles (collectively, the "Replacement Guarantees").

To provide protection to the Bank Defendants during this thirty-day "unguaranteed" period, Linter Group and Linter Textiles, prior to Stage I, also provided to those defendants: (a) a copy of the underwriting agreement with Drexel, (b) an irrevocable undertaking from Linter Textiles to pay the proceeds

of the Public Offering to Linter Group, and (c) an undertaking to keep such proceeds on deposit in a segregated account until Stage II was completed.

The Bank Defendants were direct and knowing beneficiaries of the fraud. As an inducement to the Bank Defendants to enter into the aforesaid arrangements, $100,000,000 of the proceeds of the Public Offering was to be utilized to pay down existing Linter Group Debt.

The evidence is undisputed that the Bank Defendants were aware that the Original Guarantees were forbidden by the terms of the Indenture, and that the Substituted Guarantees were put in place to circumvent those terms and to permit the banks to maintain a position as creditor senior to that of United States investors. In this regard, the Bank

Defendants expressly sought the application and protection of New York law, which permits debt to be subordinated, rather than Australian law, which provides that in a winding up, all debts rank equally. Accordingly, the Bank Defendants required Skadden, Arps to provide written and oral legal opinions that the Replacement Guarantees would leave them in a security position identical to that existing prior to the Public Offering. They further required Skadden, Arps and Linter's Australian counsel to provide opinions that New York law, rather than Australian, would prevail.

The undertakings referred to above were finalized on October 11, 1988, and were sent to all of the Bank Defendants. On October 12, 1988, the day before the

Debentures were to be delivered pursuant to the Public Offering, each of the Bank Defendants executed releases of the Original Guarantees. Within 30 days of the Public Offering, the Replacement Guarantees were put in place by Linter Textiles and the Linter Subsidiaries.

None of these facts was disclosed to purchasers of the Debentures. The Prospectus omitted any mention of the Original Guarantees, the various temporary security agreements between the Linter Companies and the Bank Defendants, or the Replacement Guarantees. To the contrary, the Prospectus represented that following the Public Offering, Linter Textiles would have long-term debt, apart from the Debentures, of only A $14 million. This representation was knowingly false.

The documentary evidence confirmed that the Bank Defendants were aware of the fraud, and entered into the guarantee arrangements expressly to avoid "onerous SEC information requirements in the U.S. in respect of guaranteeing companies."

As noted above, in connection with the Public Offering, petitioners transacted no business in Australia, and lacked any minimum contacts with that jurisdiction. They had no communications with anyone in Australia, but dealt directly with the United States underwriter.

Most significantly, the Trust Indenture contained a forum selection clause and a choice of law provision, which provided that Linter Textiles submitted to the jurisdiction of the United States, designated an agent for

process, and agreed that New York law governed any dispute under the Indenture. An alternate agent for process was chosen with respect to any suit alleging violations of the securities laws.

Thus, it was understood by the parties to the Public Offering that any claims, such as those asserted in Linter I and Linter II, would be litigated in New York. The Bank Defendants were aware of these provisions when they agreed to subvert petitioners' rights under the Trust Indenture.

Because all of the Linter Companies have become insolvent, and are in liquidation, and because the debentureholders are subordinated to the payment of all other debt, it is unlikely that petitioners will recover any money under the Indenture.

C. The Complaints.

Based upon the material misrepresentations and omissions set forth above, petitioners asserted various claims against the respondents under both federal and state law. In Linter I, they asserted claims under Sections 11, 12(2) and Rule 10b-5 against Linter Group, Linter Textiles, the Linter Subsidiaries, and the Linter Textiles Directors, as well as assorted state law claims, including common law fraud, fraudulent conveyance, and breach of the Indenture.

In Linter II, the complaint alleged that the Bank Defendants knowingly acted in concert with Linter Group and Linter Textiles and conspired with them to defraud investors and aided and abetted that fraud. The Linter II complaint asserts a claim under Rule 10b-5 and

sought compensatory damages.

D. Proceedings In Australia.

As previously noted, the Linter Companies are in the process of liquidation in Australia. The record reflects that Australian winding-up proceedings differ markedly from United States bankruptcies. One major difference is that Australia does not provide for a separate bankruptcy court as in the United States. Instead, liquidations are overseen by ordinary trial judges of each state, in this instance, Justice McLelland of the Supreme Court of New South Wales, Sydney Registry, Equity Division (the "New South Wales Court").

A second major difference between the systems is that, under ordinary circumstances, Australian law does not

require that claims against the estate be resolved in core bankruptcy adversary proceedings, as in this country.

Complicated claims, involving complex legal and factual issues or multiple parties not subject to the liquidation are not ordinarily determined by the court overseeing the winding-up. Leave is generally granted to bring such claims in a separate trial court to determine the validity of the claim. The judgment of the trial court is then presented as the claim.

In this case, it was undisputed by any of the parties that, if Linter I and Linter II are litigated in Australia, they will be litigated not before Justice McLelland of the New South Wales Court, but before another trial judge in a separate proceeding. Indeed, the

district court expressly found that the New South Wales Court would not determine claims against the Linter Companies. (A-107; A-139-140.)

Australian insolvency proceedings differ from United States bankruptcies in one final significant manner relevant to this action. While the relevant Australian insolvency statute contains an automatic stay provision that, on its face, appears to stay all actions upon the appointment of a liquidator, it is undisputed that Australian courts have unwaveringly held that this provision applies only to actions commenced within the state in which the liquidation is pending or, if certain ministerial filings are made, within the other states of Australia. It is undisputed by any of the parties that Australian law does not

stay actions commenced by a foreign creditor in its own forum. As a consequence, it is undisputed that nothing in Australian law required petitioners to bring their claims against the Linter Companies in Australia, or served to stay the commencement and prosecution of Linter I and Linter II.

In reliance upon Australian law, discussed above, after it became apparent that the Linter Companies had committed a gross fraud, petitioners, after a careful investigation by a major law firm, commenced Linter I and Linter II in this country, and they commenced no action in Australia. However, after each of the respondents either had moved to dismiss or announced its intention to do so in these actions, petitioners determined to protect their position in Australia by

instituting two proceedings there. The record before the court below was clear that each was begun for defensive purposes to preserve petitioners' right to litigate in this country. They were all in response to actions taken by defendants in Australia to try to prevent petitioners from litigating in the United States.

Although the record was undisputed as to the status of those proceedings, the opinion of the court below contained numerous errors with respect thereto. The result was to create the inaccurate impression that petitioners had elected to litigate their claims in Australia, when the exact opposite was true.

Thus, contrary to the Second Circuit's opinion, as noted above, these proceedings were begun not before the

commencement of Linter I and Linter II, but long after. In the first instance, because the Bank Defendants had moved to dismiss Linter II in favor of Australia, petitioners filed an action in Australian federal court (the "Australian Federal Action") eight months after filing Linter I, solely to prevent the expiration of relevant statutes of limitations. Contrary to the inexplicable assertion of the Second Circuit, petitioners did not seek to stay that action unsuccessfully (A-4). Rather, the Linter Companies consented to its being filed, despite the statutory provision that automatically stayed any lawsuit in Australia, on condition that petitioners do not apply to the Australian bankruptcy court for permission to pursue the claim. (A-82)

In addition, petitioners commenced a

declaratory judgment action before the New South Wales Court (the "Declaration Proceeding") seeking a declaration that under Australian law, amounts due under the Debentures should be paid directly to the Indenture Trustee, regardless of any fraud claims. (A-82) Again, the purpose of this motion was to ensure that ultimate questions of subordination and fraud would have to be litigated in this country. The Bank Defendants cross-moved for a determination by the Australian court of questions of New York law. Again contrary to the Second Circuit, it was these cross-claims, not the Declaration Proceeding, that petitioners sought to stay. While the New South Wales Court declined to stay these claims, it did expressly limit the scope to determinations of Australian law that

were without prejudice to any fraud-based claims asserted in Linter I and Linter II.

Finally, as discussed more fully below, after the district court's Linter I opinion dismissing the action on the ground of comity, petitioners moved in the New South Wales Court for leave to proceed with Linter I, or for a declaration that such leave was not necessary. The court granted the latter relief, but not the former, on the technical ground that since leave was unnecessary, the court was without power to grant it.

Thus, apart from the filing of a complaint, no steps have been taken in Australia to litigate the claims at issue here. Instead, all steps taken there have been to preserve petitioners' right

to litigate here. Petitioners' appearance in Australia is no more evidence of their willingness or ability to litigate in Australia than defendants' appearances here demonstrates their willingness to litigate in this country.

ARGUMENT

In Piper Aircraft Company v. Reyno, 454 U.S. 235, 255 (1981), reh'g denied, 455 U.S. 928 (1982), this Court stated that a United States plaintiff's choice of its own forum is entitled to "greater deference" than the choice of a foreign plaintiff. Previously, in Swift & Co. Packers v. Compania Columbiana del Caribe, 339 U.S. 684, 697 (1950), this Court stated that "a suit by a United States citizen against a foreign respondent brings into force considerations very different from those

in suits between foreigners."

Since Piper, which was a suit by foreign plaintiffs, this Court has not had occasion to articulate exactly how much deference should be given to a United States plaintiff's choice of forum. Since that time, different Circuit Courts of Appeal have reached different conclusions with respect to this question. On one end of the spectrum, the Eighth Circuit, in Reid-Whalen v. Hansen, 933 F.2d 1390, 1396 (8th Cir. 1991), reh'g denied, 1991 U.S. App. Lexis 18497, has stated:

> [W]hen the plaintiff is a U.S. citizen with a real interest in the controversy, the plaintiff's forum choice always should be accorded substantial deference at the outset. Lacey v. Cessna Aircraft Co., 862 F.2d 38, 45 (3d Cir. 1988). Only then should the district court analyze the Gilbert factors. . . . (Emphasis in original.)

On the opposite end, the court

below, although giving lip service to a "presumption in favor of plaintiff's choice of forum," in fact has vitiated that presumption by holding that "it must "adher[e] to the simple uniform standard of Gilbert in all instances." (A-11), citing Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 153 (2d Cir.) (en banc), cert. denied, 449 U.S. 890 (1980). Moreover, the Second Circuit's application of a lesser standard went far beyond its apparent goal of establishing a level playing field between the parties,[3] and tipped the balance in favor

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[3]The Second Circuit's decision continues a "trend", noted in the dissenting opinion in Alcoa, away from according any significance to the plaintiff's citizenship and toward resting forum non conveniens decisions solely "upon a balancing of conveniences." 654 F.2d at 163. In this case, the court below ignored Piper, and based its affirmance upon an (erroneous) balancing of the parties' convenience.

of foreign defendants. The court's decision resulted in the bizarre anomaly of United States investors being relegated to an Australian court, applying United States law to adjudicate a claim arising out of fraud, that occurred in the United States, in connection with the purchase, in the United States, of a United States registered security, that injured only United States investors. The court's decision also sets a precedent that will, in the future, deprive other United States investors of their day in court.

This Court should establish a uniform standard with respect to what deference should be accorded a United States plaintiff's choice of forum.

I. THE DOCTRINE OF FORUM NON CONVENIENS REQUIRES THAT THE CHOICE OF FORUM OF A UNITED STATES PLAINTIFF BE GIVEN GREATER DEFERENCE. THE COURT BELOW FAILED TO GIVE SUCH DEFERENCE.

In Piper Aircraft Co. v. Reyno, supra, this Court reiterated the principle, first announced in Gulf Oil v. Gilbert, 330 U.S. 501 (1947) and its companion case, Koster v. Lumbermen's Mutual Casualty Co., 330 U.S. 518 (1947), that a plaintiff's choice of forum should rarely be disturbed, and only in exceptional circumstances. 454 U.S. at 241.

This Court stated that only "when trial in the chosen forum would 'establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience' or when the chosen forum is inappropriate because of

considerations affecting the court's own administrative and legal problems" may the court, in the exercise of its discretion, dismiss the case. (Id.) This Court further stated that when balancing the conveniences of the respective parties, a court must give greater deference to an American's choice of his own forum than to the choice of a foreigner. 454 U.S. at 235.

Unlike the plaintiffs in Piper and Gulf Oil, petitioners in this action did not select a foreign forum, inconvenient to themselves, in order to avail themselves of favorable law. Rather, they chose to sue in their home forum seeking to enforce remedies granted to them by Congress in connection with the sale of securities registered in the United States.

Nonetheless, both the district court and the court below determined that these actions should be tried in Australia. Both courts did so without any finding that petitioners' choice of forum was either "oppressive or vexatious" or that it was "inappropriate."[4] Instead, the district court merely held that the "balance of conveniences ha[d] shifted," placing the burden upon petitioners to convince the court that their choice of forum was more convenient than Australia (A-142) Application of this lesser standard, which was affirmed by the court below, conflicts with this Court's decision in Piper.

As Piper makes clear, the

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[4]Indeed, in its first Linter II decision, the district court held that New York had a greater interest in the action than Australia.

commencement of a lawsuit by a United States citizen or resident in a United States court, gives rise to two presumptions, reflecting both a private and a public interest factor which, if unrebutted, impel the court not to disturb the plaintiff's choice of forum. The first presumption, reflecting the private interest, is that a plaintiff chooses his own forum, not to inconvenience the defendant, but because it is convenient to him. Piper, 454 U.S. at 255. The second presumption, reflecting the public interest, is that a United States citizen or resident has a reasonable expectation that he will be afforded access to United States courts and the protections of United States laws. The United States has a reciprocal interest in enforcing its own law -- in

this instance -- the federal securities laws -- and protecting the rights of its citizens. Burt v. Isthmus Development Company, 218 F.2d 353, 356 (5th Cir.), cert. denied, 349 U.S. 922 (1955).

Where these presumptions are not rebutted, i.e., where the plaintiff's choice of forum is both "convenient" and "appropriate", then as Judge Friendly stated in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972), the defendant should be required to present "evidence of unusually extreme circumstances" and "manifest injustice" to deny plaintiff his choice of forum.

In this case, there was no showing that either presumption was even remotely challenged. To the contrary, numerous factors demonstrated that New York was

both a convenient and appropriate forum, including the following:

1. Petitioners are all institutional investors located in the United States who transact business in New York. They include insurance companies and mutual funds who indirectly represent thousands of further United States investors and policyholders.

2. Petitioners did not transact any business or have any contact with Australia, or anywhere else outside the United States.

3. The Debentures were registered in the United States with the SEC.

4. The Debentures were offered and sold only in the United States.

5. All of the misrepresentations were made in the United States.

6. The Debentures were delivered

for sale in the United States.

7. The misrepresentations which violated U.S. securities laws gave rise to an express cause of action independent of plaintiffs' citizenship or choice of forum.

8. Defendants utilized a United States underwriter, Drexel, and United States counsel.

9. The Indenture named a United States bank, U.S. Trust, as indenture trustee.

10. Petitioners' witnesses and important third-party witnesses are located in the United States, including witnesses not subject to the personal jurisdiction of Australia.

11. The injury resulting from defendants' fraud was sustained by United States investors and by the United States

securities market as a whole, where the Debentures were publicly traded.

12. Finally, and most important, petitioners expressly bargained for the right to sue in the United States under the United States securities law, a right set forth in the Indenture and prominently displayed at the front of the Prospectus. This right to sue was a material component of each petitioner's decision to invest in the Debentures.

In light of these factors, the refusal of the court below even to acknowledge, let alone give any weight to petitioners' choice of forum, conflicts with Piper. The court's decision stretches the doctrine of forum non conveniens beyond recognition. It is the first and only decision in which U.S. plaintiffs, who transacted business

solely within the United States, were forced to litigate in a foreign country. Similarly, it is the first and only decision to defer to a foreign court to determine claims under the securities laws with respect to securities registered and publicly offered and sold within, not without, the United States. Compare, Howe v. Goldcorp, 946 F.2d 944, 953 (1st Cir. 1991), cert. denied, 112 S.Ct. 1172 (1992) (Sales and misrepresentations made "abroad") (Emphasis in original.). If allowed to stand, it will provide the district courts with virtual carte blanche to deny United States plaintiffs access to United States courts.

In McGee v. International Life Ins. Company, 355 U.S. 220, 223 (1957), this Court recognized the inequity of such a

precedent when it determined that a Texas insurer that refused to pay a claim to a California resident, could not require that resident, and others like him, to seek redress only in Texas. As this Court stated:

> These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable. When claims were small or moderate, individual claims frequently could not afford the cost of bringing an action in a foreign forum -- thus in effect making the company judgment proof.

The effect of the decision of the court below is to vitiate any deference to a United States plaintiff's choice of its own home forum, and to tip the balance in favor of foreign defendants. Thus, while the district court noted that American parties who engage in overseas transactions "cannot always expect to bring their foreign opponents into a

United States forum," (A-131), its decision, and that of the court below will permit foreign parties to do precisely that. Foreign issuers will be free to come to this country, defraud United States investors, and then require such investors "to follow them to a distant [country], and in effect make themselves judgment proof," because they will be able to argue that proof of their fraud will be located in their forum. The result will injure not only the investors themselves, but as in this case, those who invest in such investors, such as mutual fund shareholders and insurance company policy holders.

Nothing in the record of this action justifies such a harsh precedent. Neither the district court nor the court below made any finding that respondents

would suffer oppressiveness or vexation if required to litigate in New York. With respect to witnesses, the district court expressly recognized that prosecution in either forum will prohibit compulsory process over some possible third party witnesses. (A-60-61) Other problems identified by the court below -- the absence of the Linter Defendants and the inability to cross-claim -- resulted from the court's own erroneous decision to dismiss Linter I, both as to the Linter Companies and the individual defendants. Indeed, the court below never explained how consideration of comity related to the liquidation of a company -- i.e., the centralization of claims and orderly distribution of assets -- applied to individual defendants not parties to the liquidation.

Moreover, these problems are hardly out of proportion to the exorbitant expense and difficulties facing petitioners if they are forced to litigate in Australia.[5] Critical witnesses from Skadden, Arps and Drexel will be absent, and petitioners will have to maintain two sets of lawyers, Australian and U.S., to present securities law claims to an Australian court.

In the absence of some extreme and compelling circumstances, petitioners

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[5]For example, its comparison of the only cross-claim available to defendants under the securities laws, contribution, to the claim for indemnification in Piper is totally disingenuous. The prerequisite for a claim of indemnification is an absence of fault; that of contribution is an adjudication of fault. Thus, the court below gave greater deference to claims that might be asserted by adjudicated wrongdoers, than to those asserted already by innocent investors.

should not be deprived of their day in court.

II. THE COURT BELOW DISTORTED THE MEANING OF COMITY SO AS DEPRIVE PETITIONERS OF THEIR CHOSEN FORUM.

As noted above, the district court initially denied respondents' motion to dismiss in Linter II, but then reversed itself. The purported basis for this reversal was the court's intervening decision in Linter I, which dismissed petitioners' claims against both the Linter Companies and the individual defendants on the basis of comity. Comity provides no basis to deprive petitioners of their chosen forum.

Nearly one hundred years ago, in Hilton v. Guyot, 159 U.S. 113, 164 (1895), this Court defined comity in the following terms:

> [C]omity is the

> recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

As this Court's language made abundantly clear, before a court may exercise its discretion to balance the interests of its own citizens against the interests of a foreign jurisdiction, it first must make the obvious determination that the foreign jurisdiction has such an interest. In the words of one court, a defendant seeking to invoke comity to stay or dismiss an action is required to cite some "legislative or judicial act of any agency or court stating a policy or even a desire" that this action be stayed or dismissed. Majorica, S.A. v. Majorica International, Ltd., 687 F.Supp. 92, 97

(S.D.N.Y. 1988), see also, Sumitomo v. Parakapi Compania Maritima, S.A., 477 F.Supp. 737, 742 (S.D.N.Y. 1979), aff'd mem., 620 F.2d 286 (2d Cir. 1980).

If, as here, there is no such interest, the district court has no discretion to send a United States plaintiff to litigate in a foreign jurisdiction. The undisputed evidence before the court below was that Australia has no such an interest. An unbroken line of cases in Australia, not challenged by any defendant or the court below, expressly holds that the automatic stay provision referred to by the Second Circuit does not apply extraterritorially, and that foreign creditors are not only permitted, but in

certain cases, obligated[6] to assert their claims for relief in their own forum. United States Surgical Corp. v. Ballabil Holdings Pty., (1986) 4 ACLC 635 (Austl.)(McLelland, J.); Bond Media Ltd. v. John Fairfax Group Pty. Ltd., (1989) 7 ACLC 201, 202-205 (Austl.); Capita Financial Group Ltd. v. Rothwells Ltd., (1989) 7 ACLC 371, 373 (Austl.); Consulere Design and Construction Pty. Ltd. v. Hooker Corporation, (1991) 2 VR 189, 190 (Austl.).

Any possible doubt as to the applicable law in Australia was removed by the New South Wales Court in the Linter Company liquidations, themselves. After the district court's Linter I

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[6]E.g., where a claim is a compulsory counterclaim. O'Brien v. Tanning Research Laboratories Inc., (1988) 14 NSWLR 601, 615, aff'd, (1990) 169 CLR 332 (Austl.).

decision, but prior to the court's second decision in Linter II, petitioners moved for a declaration and order from the New South Wales Court: (1) Granting petitioners leave nunc pro tunc to proceed with Linter I and Linter II; or, alternatively, (2) Declaring that petitioners did not require such leave to proceed with those actions.

In an opinion dated October 9, 1992, the New South Wales Court reaffirmed its prior decision in U.S. Surgical. Since Australian law does not stay foreign proceedings, it therefore does not provide a procedure to gain relief from a stay. Therefore, the court held that it had "no power" to grant such relief.

With respect to petitioners' second request, the New South Wales Court was even more emphatic:

> Since it was accepted on all sides that no leave was required from this Court in relation to the commencement or continuation of the proceedings against any of the liquidated Linter corporations in the United States District Court, as was recognized by that Court itself in its judgment of 1 June 1992, there is no contest or doubt sufficient to justify the making of a declaratory order on the matter.

The history and policy underpinning these decisions was articulated by an earlier, English decision, In re Vocalion Foreign (Ltd.), (1932) 2. Ch. 196 (Eng.), which the New South Wales Court, in its previous U.S. Surgical decision, expressly cited as representing "mutatis mutandis the law of New South Wales."

In Vocalion, the court considered the same issue presented to the New South Wales Court and other Australian courts -- whether a legislative stay should be applied extraterritorially to restrain a

foreign creditor from continuing a foreign litigation. 2 Ch. at 202. After quickly answering that question in the negative, the court next determined, however, that it "undoubtedly" retained the equitable power to restrain the "foreign corporation properly served within the jurisdiction from endeavoring by proceedings in its own court to enforce payment of a debt notwithstanding the liquidation in this country." 2 Ch. at 204-5.

The court then addressed the final question, which it found to be of "considerable difficulty and importance," and which it phrased as follows:

> Would it be right to restrain such a corporation . . . from exercising such rights of action as may exist in the foreign country? 2 Ch. at 205.

After extensively reviewing the

relevant authorities, the Vocalion court answered this question "no", stating:

> [T]he judgments tend, I think, strongly to support the view that this court ought not to restrain a foreigner from securing in a foreign country such rights in respect of a contract made and to be performed there as the lex fori will give him.
>
> * * *
>
> I have been unable to find any case in which the Court in the exercise of its jurisdiction in personam has restrained a foreigner or a foreign corporation from exercising his or its rights in a foreign court in relation to a contract to be performed abroad on the ground that there has been a winding-up order in this country.

Among the policy reasons articulated by the court for not granting such an injunction were: (a) Because the court could restrain foreign creditors subject to its personal jurisdiction, but not those not subject thereto, restraining

the former would unfairly disadvantage them vis-a-vis the latter without benefitting the estate, and (b) because "it would not appear to be fair or just to deprive foreign creditors of any rights which they may have in the foreign country." 2 Ch. at 205-06.

The difference between Australian and United States bankruptcy laws is not "slight", as the court below suggested, nor does one "split hairs" when one recognizes the difference. (A-8.) To the contrary, the two nations are at the opposite ends of the bankruptcy spectrum, the Australian courts espousing what commentators term the "territorial" approach, and the United States espousing the "universalist" approach.

Both nations recognize that they have the power to restrain a foreigner

subject to their personal jurisdiction from litigating in a foreign forum. Compare U.S. Surgical and Vocalion with In re Fotochrome, Inc., 377 F.Supp. 26, 28-29 (S.D.N.Y. 1974), aff'd sub nom., Fotochrome, Inc. v. Copal Company, 517 F.2d 512 (2d Cir. 1975). However, in this country, such restraint is by legislative act (Bankruptcy Code, 11 U.S.C. § 362), is automatic, and places the burden on the creditors to seek relief from the stay. In re McLean Industries, Inc., 68 B.R. 690 (Bkrtcy. S.D.N.Y. 1986); In re Deak & Co., Inc., 63 B.R. 422, 432 (Bkrtcy. S.D.N.Y. 1986); Societe Nationelle Algerienne Pour La Recherche, etc. v. Distrigas Corp., 80 B.R. 606 (Bkrtcy. D. Mass. 1987)

By contrast, in Australia, there is no presumption that foreign creditors

should be restrained. They may be stayed only by the court, in its discretion, and the burden is upon the debtor to show that it is entitled to such a stay. U.S. Surgical, supra; Vocalion, supra; 2 Dicey and Morris, Conflict of Laws, Rule 177, p. 1148 (11th Ed. 1987).

By purporting to defer to Australian proceedings, but at the same time eliminating petitioners' right, inherent in those proceedings, to litigate its claims in its own forum, the court below prejudiced petitioners' due process rights on two levels -- it deprived petitioners of their right to litigate in the United States granted by United States law, and by Australian law.

In doing so, the court below refused to answer the sole question which

petitioners presented on appeal[7] -- if Australian law, and more particularly, the Australian court overseeing the Linter Companies' liquidation, expressly states that plaintiffs may continue Linter I and Linter II, what conceivable basis is there in comity for the court below to say that plaintiffs may not?

Without any such basis, the court below had no basis to deprive petitioners of their protections afforded by the securities laws and their right to sue in United States courts.

CONCLUSION

For the reasons set forth above, the

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[7]Rather than address the argument raised by petitioners, the court below addressed an argument of its own making -- whether Australian liquidations were "fair". Not only did petitioners not argue that Australian proceedings were unfair, they expressly disclaimed such an argument both in their briefs and at oral argument.

instant petition should be granted.

Dated: New York, New York
August 31, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1378, 1379—August Term 1992

(Argued April 22, 1993 Decided June 2, 1993)

Docket Nos. 92-9064L, 93-7052CON

ALLSTATE LIFE INSURANCE CO., et al.,

Appellants,

—v.—

LINTER GROUP LIMITED, et. al.,

Appellees.

Before:

TIMBERS, KEARSE, and ALTIMARI,

Circuit Judges.

Appeal from judgments entered in the Southern District of New York, Robert P. Patterson, Jr., *District Judge*, dismissing securities actions on the grounds of comity and forum non conveniens in recognition of liquidation proceedings pending in Australia.

Affirmed.

JOHN F. HARNES, New York, N.Y. (Silverman, Harnes, Obstfeld & Harnes, on the brief), *for appellants*.

FRANCIS M. HOLOZUBIEC, New York, N.Y. (Terrence J. Galligan, and Kirkland & Ellis, on the brief), *for appellees Liniter Companies and their liquidators, officers, and directors*.

GEORGE BRANDON, New York, N.Y. (B. Kelly Kiser, and Milbank, Tweed, Hadley & McCloy, on the brief), *for appellees Australian and New Zealand Banks*.

TIMBERS, *Circuit Judge*:

Appellants appeal from judgments entered in the Southern District of New York, Robert P. Patterson, Jr., *District Judge*, dismissing securities actions on the grounds of comity and forum non conveniens in recognition of liquidation proceedings pending in Australia.

On appeal, appellants contend that the court abused its discretion in dismissing their actions.

We reject appellants' claims and we affirm the judgments in all respects.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

The actions consolidated for this appeal, *Allstate Life Ins. Co. v. Linter Group Ltd.*, 91 Civ. 1655 (*Linter I*) and *Allstate Life Ins. Co.v. Linter Group Ltd.*, 91 Civ. 2873 (*Linter II*), arose from the October 13, 1988 public offering in the United States by appellee Linter Textiles Corporation Ltd. (Linter Textiles), an Australian corporation, of approximately $200 million of its 13 3/4% Senior Subordinated Debentures. The debentures were registered with the Securities and Exchange Commission (SEC), underwritten by Drexel Burnham Lambert, Inc., and issued pursuant to a trust indenture between Linter Textiles and United States Trust Company of New York. Pursuant to SEC regulations, Linter Textiles filed an amended registration statement and disseminated a prospectus to the public.

Prior to the offering, Linter Textiles' parent corporation, appellee Linter Group Ltd. (Linter Group), had outstanding debt of 323,000,000 in Austrailian dollars. This debt was guaranteed to nine Australian and New Zealand banks (Banks) by Linter Textiles' subsidiaries through negative pledge agreements. On the day before the public offering, Linter Group, Linter Textiles' subsidiaries, and the Banks executed identical agreements releasing the subsidiaries from their guarantees in exchange for promises by Linter Textiles and its subsidiaries to enter into new agreements with the Banks and with each other to guarantee Linter Group's debt within 30 days. These agreements were not disclosed in Linter Textiles' prospectus or its registration statement. Instead, the prospectus stated that Linter Textiles would be virtually debt free after the offering.

In 1991, Linter Group, Linter Textiles, and Linter Textiles' subsidiaries (collectively the Linter companies) became insolvent and were placed in liquidation by orders

of the Supreme Court of New South Wales, Australia. Subsequently, appellants, a group of institutional investors, including insurance companies and publicly-traded mutual funds owning more than $120 million in debentures, commenced an action in the Australian Federal Court against, *inter alia*, the Linter companies and the Banks, alleging violations of Australian law in connection with the public offering. Appellants also commenced a declaratory judgment action in the Equity Division of the New South Wales Court requesting a ruling under Australian law that their claims were not subordinate to the Banks' claims. Appellants subsequently have attempted unsuccessfully to stay these proceedings in favor of their United States actions, *Linter I* and *Linter II*. At present, both Australian suits are pending.

(A) *Linter I*

On March 8, 1991, appellants commenced an action in the Southern District of New York against the Linter companies, their liquidators, and several of their officers and directors, alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as state and common law. Specifically, appellants alleged that Linter Textiles' prospectus and registration statement contained material misrepresentations that induced them to purchase debentures. On December 12, 1991, defendants in that action moved to dismiss or stay the action on the basis of the ongoing liquidation proceedings in Australia and on the ground of forum non conveniens. Following oral argument on the motion, on March 20, 1992, the court ordered the parties to submit additional briefing on the issue of whether the Australian insolvency proceedings were being conducted in an unfair manner so that appellants' claims would be prejudiced in those pro-

ceedings. In an opinion and order dated June 1, 1992, the court granted defendants' motion to dismiss, on the ground of comity, in favor of the ongoing liquidation proceedings in Australia. Judgment was entered on June 8, 1992. On September 4, 1992, the court denied appellants' Fed. R. Civ. P. 59(e) motion to amend the judgment.

(B) *Linter II*

On April 26, 1991, appellants commenced another action in the Southern District of New York against the Linter companies and the Banks, alleging that the Banks aided and abetted as well as conspired with the Linter companies to defraud them, in violation of § 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder. In July 1991, the Banks moved to dismiss the complaint on the ground of forum non conveniens. In an opinion and order dated January 9, 1992, the court denied the Banks' motion. *Allstate Life Ins. Co. v. Linter Group Ltd.*, 782 F. Supp. 215 (S.D.N.Y. 1992). Accordingly, on February 14, 1992, the Banks answered the complaint and asserted cross-claims for contribution and indemnification against the Linter companies. After the court dismissed *Linter I*, however, the Banks filed a second motion to dismiss on the ground of forum non conveniens. The Linter companies also moved to dismiss on the ground of comity, asserting that the rationale of the court's decision in *Linter I* was equally applicable to *Linter II*. In an opinion and order dated December 21, 1992, the court granted both motions. Judgment was entered on January 4, 1993.

Appellants now appeal from both judgments, asserting that the court abused its discretion in dismissing *Linter I* on the ground of comity and *Linter II* on the grounds of comity and forum non conveniens.

II.

(A) *Comity*

Appellants contend that the court improperly dismissed *Linter I* and *Linter II* against the Linter companies, their liquidators, and several of their officers and directors on the ground of comity. The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). As a general rule, comity may be granted where "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2 Cir. 1985). Indeed, as long as the foreign court abides by "fundamental standards of procedural fairness", granting comity is appropriate. *Id.*

Moreover, we have recognized that comity is particularly appropriate where, as here, the court is confronted with foreign bankruptcy proceedings. *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2 Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings."). We also recognize that, since comity is an affirmative defense, the Linter companies carried the burden of proving that comity was appropriate. *Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877, 880 (2 Cir. 1985). Further, since the extension or denial of comity is within the court's discretion, we will reverse the court's decision only when we find an abuse of discretion.

Remington Rand Corp.-Delaware v. Business Sys., Inc., 830 F.2d 1260, 1266 (3 Cir. 1987); *Cunard*, *supra*, 773 F.2d at 460.

In determining whether the Australian insolvency proceedings warranted comity, the court, applying the law of this Circuit, focused on several factors as indicia of procedural fairness. These factors included: (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims. *Cunard*, *supra*, 773 F.2d at 459-60; *In re Gee*, 53 B.R. 891, 903 (Bankr. S.D.N.Y. 1985).

In the instant case, appellants do not challenge the court's finding that Australian law satisfies the first seven of these factors. Rather, appellants contend that the court abused its discretion in finding that former § 371(2) of the New South Wales Companies Code (superseded by § 471(2) of the Corporations Law) provides for a sufficient stay to facilitate the centralization of claims. Appellants assert that § 371(2) differs from the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362 (1988 & Supp. III 1991), in that the former provides a stay by leave of court only, while the latter automatically provides for a stay. This difference, appel-

lants contend, demonstrates that the Australian proceedings are not fundamentally fair and comity should not have been granted.

Contrary to appellants' assertions, however, there is no requirement that Australian liquidation proceedings be identical to United States bankruptcy proceedings. *In re Brierly*, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992) ("Nothing dictates that the foreign law be a carbon copy of our law. . . ."); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 810 (Bankr. S.D.N.Y. 1992) ("Foreign proceedings need not be identical to those under the Bankruptcy Code"). Indeed, contrary to appellants' assertion, the court was not required to split hairs to determine that Australian law, in general, provides a fair forum in which to litigate appellants' claims. What is important is that Australian law provides a stay procedure to centralize all claims and "enable[ ] the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner." *Cunard*, *supra*, 773 F.2d at 458. The fact that the Australian procedure differs slightly from the United States' stay procedure is irrelevant, especially where, as here, there is no indication that appellants would be prejudiced if they are required to maintain their actions in Australia. Further, the fact that appellants have received notice of every step of the proceedings, have attended all scheduled meetings and court hearings, are represented on the Committees of Inspection advising the liquidators, and have filed two actions in the Australian courts, indicates that the Australian proceedings generally comport with fundamental standards of procedural fairness. *Id.* at 457.

Affording comity also did not violate any laws or public policies of the United States. *Id.* at 456. "American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own

domestic business entities." *Id.* at 458. Further, where, as here, "the granting of comity to a Foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion", comity has long been recognized as appropriate. *Id.*

Particularly illuminating here is *Lindner Fund*, 143 B.R. at 810, where a bankruptcy court in our Circuit dismissed a securities action, brought by American citizens, in favor of English bankruptcy proceedings. The court recognized that its decision was "supported by case law and general principles of international comity . . . [and] would further the public policies underlying the automatic stay provisions of the English Insolvency Act and the analogous provision of the United States Bankruptcy Code." *Id.* Similarly, granting comity is supported here by prior decisions of this court and furthers United States policy. *Cunard*, *supra*, 773 F.2d at 459 ("the public interest in the fair and efficient distribution of assets in a bankruptcy is [ ] significant").

Appellants emphasize the presence of a forum selection and choice of law clause in the Indenture Agreement which selects New York as a forum and New York law to govern the agreement. Appellants contend that this clause indicates that the court abused its discretion in granting comity in favor of the Australian proceedings. The presence of such clauses, however, does not preclude a court from granting comity where it is otherwise warranted. *Kenner Products Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479-80 (S.D.N.Y. 1982) (submission to jurisdiction of United States court did not override concerns of comity and judicial efficiency); *Cornfeld v. Investors Overseas Serv., Ltd.*, 471 F. Supp. 1255, 1260-61 (S.D.N.Y.) (dismissing action based on

indemnity agreement against foreign bankrupt company on comity grounds despite clause in agreement selecting New York law), *aff'd*, 614 F.2d 1286 (2 Cir. 1979).

We hold that the court did not abuse its discretion in dismissing appellants' actions against the Linter companies in recognition of the liquidation proceedings in Australia.

(B) *Claims Against The Individual Defendants*

Appellants also contend that the court improperly dismissed *Linter I* as to various individual defendants. While appellants correctly state that the court did not articulate a basis for dismissing as to these defendants, it cannot be said that the court abused its discretion where, as here, it would have been inefficient and inequitable to permit the individual claims to go forward. Indeed, since these individuals were sued solely because of their affiliation with the Linter companies, to allow these claims to go forward in the United States despite the dismissal as to the Linter companies would defeat the purpose of granting comity in the first place.

We hold that the court properly dismissed the claims against the individual defendants.

(C) *Forum Non Conveniens*

Appellants also contend that the court erred in dismissing *Linter II* as to the Banks on the ground of forum non conveniens. They assert that, in considering a motion to dismiss on the ground of forum non conveniens, "courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the

courts of this country." *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2 Cir. 1972) (citation omitted). Since our decision in *Leasco*, however, we have recognized that the reluctance to dismiss on the ground of forum non conveniens is not "as profound as the language [in *Leasco* and earlier cases] might suggest." *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 156 (2 Cir.) (en banc), *cert. denied*, 449 U.S. 890 (1980). Although there is still a strong presumption in favor of a plaintiff's choice of forum, the Supreme Court has recognized that dismissal nevertheless may be appropriate where certain private and public interest factors point towards trial in an alternative forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

The private and public interest factors recognized by the Court in *Gilbert* include: (1) the ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) practical problems involving the efficiency and expense of a trial; (5) enforceability of judgments; (6) administrative difficulties flowing from court congestion; (7) imposing jury duty on citizens of the forum; (8) the local interest in having controversies decided at home; and (9) the avoidance of unnecessary problems in the application of foreign law. *Gilbert, supra*, 330 U.S. at 508-09.

In reviewing the court's decision here, we are cognizant of the fact that it is well-settled law in this Circuit that we must "adher[e] to the simple uniform standard of *Gilbert* in all instances." *Alcoa, supra*, 654 F.2d at 153; *see also Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 827-28 (2 Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991). We will reverse only the court's dismissal of an action on the

ground of forum non conveniens where "there has been a clear abuse of discretion." *Piper*, *supra*, 454 U.S. at 257; *Sussman v. Bank of Israel*, No. 92-7981, slip op. 2473, 2475 (2 Cir. April 6, 1993). Moreover, we will find such an abuse only where a court fails to "carefully consider[ ] the *Gilbert* factors." *Borden*, *supra*, 919 F.2d at 828.

Since we find that the court here carefully considered the factors set forth in *Gilbert*, we cannot say that it abused its discretion in dismissing *Linter II* on the ground of forum non conveniens. After acknowledging the "high hurdle" that the Banks had to clear to obtain dismissal on the ground of forum non conveniens, the court proceeded to consider the *Gilbert* factors. Indeed, the court properly recognized that any judgment (whether by a United States or Australian court) will have to be enforced in Australia where all of the Banks' assets are located. Further, since all of the Banks' allegedly fraudulent activity occurred in Australia, most relevant documents are located there. *Calavo Growers of California v. Belgium*, 632 F.2d 963, 967 (2 Cir. 1980) (location of documents a factor to be considered in forum non conveniens analysis), *cert. denied*, 449 U.S. 1084 (1981).

Most witnesses and other sources of proof are also located in Australia. Indeed, with the dismissal of the claims against the Linter companies (the primary perpetrators of the alleged fraudulent activity), many of their officers, directors and other key witnesses no longer are within the subpoena power of the federal court and therefore cannot be compelled to appear at trial in New York. Since their testimony as to what the Banks knew or intended regarding the contents of the prospectus is central to the case against the Banks, their unavailability is a factor favoring dismissal on the ground of forum non conveniens. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451-52

(2 Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). Further, where, as here, appellants have alleged fraud, live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor. *Schertenlieb v. Traum*, 589 F.2d 1156, 1165 (2 Cir. 1978) (absence of live testimony a "very serious handicap" favoring dismissal on the ground of forum non conveniens).

The court also properly recognized that there are practical problems associated with trying this case in the United States. The cost of bringing witnesses to the United States for trial, assuming they are willing, would be prohibitive. Indeed, to try *Linter I* in Australia and *Linter II* in the United States would not only be costly but repetitive and, since much of the evidence would be the same, would undermine "the economical use of judicial resources."

The dismissal of the Linter companies also eliminated the Banks' opportunity to pursue its cross-claims for contribution and indemnification. As the Supreme Court has recognized, the inability to implead other parties is a factor favoring dismissal on the ground of forum non conveniens. *Piper*, *supra*, 454 U.S. at 259. Here, if the trial is held in Australia the Banks will be able to assert their cross-claims simultaneously with appellants' action against them. As the court recognized, consolidating all claims in Australia avoids a situation where the Banks would have to pursue their cross-claims in Australia while defending against appellants' claims in the United States. Such a scenario not only represents a waste of judicial resources, but also creates a risk of inconsistent judgments.

While appellants are correct in asserting that United States courts have an interest in enforcing United States

securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens. *Howe v. Goldcorp Invests., Ltd.*, 946 F.2d 944, 950 (1 Cir. 1991) (court recognized that securities actions are not immune from forum non conveniens dismissal), *cert. denied*, 112 S. Ct. 1172 (1992); *Lindner Fund, supra*, 143 B.R. at 810 ("deference may be given to foreign bankruptcy proceedings where the American suit is based on United States securities laws"). Further, since the liquidation here is one of the largest in Australian history and the actions undertaken by the Banks in furtherance of the alleged fraud were carried out in Australia by Australian corporations, there is a strong local interest in trying this case in Australia. *Lindner Fund, supra*, 143 B.R. at 809 & 810 (court dismissed securities action in favor of English proceedings, noting that the liquidation there was one of the largest in that country's history).

Since the court's careful consideration of the *Gilbert* factors supported its conclusion that Australia was the proper forum for appellants' actions, we hold that the court did not abuse its discretion in dismissing *Linter II* against the Banks on the ground of forum non conveniens.

III.

To summarize:

We hold that the court did not abuse its discretion in dismissing appellants' actions on the grounds of comity and forum non conveniens.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of June, one thousand nine hundred and ninety-three

Present: HON. WILLIAM H. TIMBERS,
HON. AMALYA L. KEARSE,
HON. FRANK X. ALTIMARI,

Circuit Judges.

ALLSTATE LIFE INSURANCE CO., et al.,

Appellants,

-v.-

LINTER GROUP LIMITED, et al.,

Appellees.

Docket Nos.
92-9064L
93-7052CON

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be considered on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said district court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH, Clerk
By:

/s/ Edward J. Guardaro
Edward J. Guardaro,
Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLSTATE LIFE INSURANCE CO., ARIEL CAPITAL II L.P., ARIEL FUND LTD., CARMEL FUND LTD., CARMEL PARTNERS L.P., COLONIAL DIVERSIFIED INCOME FUND, D & P CBO PARTNERS L.P., EXECUTIVE LIFE INSURANCE CO., ITHACA PARTNERS L.P., LIFE INSURANCE CO. OF THE SOUTHWEST, MT. TAVOR PARTNERS, L.P., PROSPECT STREET HIGH INCOME PORTFOLIO, INC., PROSPECT INTERNATIONAL HIGH INCOME PORTFOLIO, N.V., UNITED HIGH INCOME FUND INC., and UNITED HIGH INCOME FUND II INC.,

Plaintiffs,

-against-

LINTER GROUP LIMITED, LINTER TEXTILES CORPORATION LIMITED, LINDSAY PHILLIP MAXSTED, RECEIVER AND MANAGER OF LINTER GROUP LIMITED AND LINTER TEXTILES CORPORATION LIMITED, JOHN BERESFORD HARKNESS, RECEIVER AND MANAGER OF LINTER GROUP LIMITED AND LINTER TEXTILES CORPORATION LIMITED, ABRAHAM GOLDBERG, COMMONWEALTH BANK OF AUSTRALIA, BANK OF NEW ZEALAND, SUMITOMO INTERNATIONAL FINANCE AUSTRALIA LIMITED, CHASE AMP BANK LIMITED, BARCLAYS BANK AUSTRALIA LIMITED, STATE BANK OF SOUTH AUSTRALIA, SECURITY PACIFIC AUSTRALIA LIMITED, AUSTRALIA

AND NEW ZEALAND BANKING GROUP LIMITED and WESTPAC BANKING CORPORATION,

Defendants.

91 Civ. 2873 (RPP)
OPINION AND ORDER

A P P E A R A N C E S

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ROBERT P. PATTERSON, JR., U.S.D.J.

This is an action for damages alleging violations of the federal securities laws. Four of the defendant banks move individually to dismiss the Complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), and all of the defendant banks move jointly to dismiss the Complaint on grounds of forum non conveniens pursuant to Fed. R. Civ. P. 12(b). For the reasons set forth below, all of the motions are denied.

BACKGROUND

I. THE PARTIES

Plaintiffs are: Allstate Life Insurance Company, an Illinois corporation with its principal place of business in Illinois; Ariel Capital II L.P., a Delaware corporation with its

principal place of business in New York; Ariel Fund Limited, a Cayman Island exempt corporation with its principal place of business in New York; Carmel Fund Limited, a Cayman Island exempt corporation with its principal place of business in New York; Carmel Partners L.P., a Delaware corporation with its principal place of business in New York; Colonial Diversified Income Fund, a Massachusetts corporation with its principal place of business in Massachusetts; D & P CBO Partners L.P., a Delaware limited partnership with its principal place of business in Illinois; Executive Life Insurance Company, a California corporation with its principal place of business in California; Ithaca Partners L.P., a Delaware Limited Partnership with its principal place of

business in New York; Life Insurance Company of the Southwest, a Texas corporation with its principal place of business in Texas; Mt. Tavor Partners L.P., a Delaware limited partnership with its principal place of business in New York; Prospect Street High Income Portfolio Inc., a Massachusetts corporation with its principal place of business in Massachusetts; Prospect International High Income Portfolio N.V., a Netherlands Antilles corporation with its principal place of business in Massachusetts; United High Income Fund Inc., a Maryland corporation with its principal place of business in Kansas; and United High Income Fund II Inc, a Maryland corporation with its principal place of business in Kansas.

Defendant Linter Group Limited

("Linter Group") is a limited company incorporated under the laws of New South Wales, Australia. Defendant Linter Textiles Corporation Limited ("Linter Textiles"), a wholly-owned subsidiary of Linter Group, is a limited company incorporated under the laws of New South Wales, Australia. At all relevant times, Linter Textiles was a holding company whose subsidiaries were engaged in various aspects of textile and apparel manufacturing business. Defendants Lindsay Phillip Maxsted and John Beresford Harkness were appointed on January 26, 1990 by the Supreme Court of Victoria at Melbourne as receivers and managers of Linter Group and Linter Textiles. Defendant Abraham Goldberg at all relevant times prior to 1990 served as a director and chief executive officer

of Linter Group and Linter Textiles. Complaint ¶ 4.

The following banks (collectively referred to as the ("Bank Defendants") are also defendants in this action: Commonwealth Bank of Australia, Bank of New Zealand, Sumitomo International Finance Australia Limited ("Sumitomo"), Chase AMP Bank Limited ("Chase AMP"), Barclays Bank Australia Limited ("Barclays Australia"), State Bank of South Australia, Security Pacific Australia Limited ("Security Pacific"), Australia and New Zealand Banking Group, and Westpac Banking Corporation.

II. FACTUAL BACKGROUND

Plaintiffs seek recovery for injuries allegedly sustained as a result of fraud committed in connection with the sale of Linter Textiles subordinated

debentures by Drexel Burnham Lambert, Inc. ("Drexel") as underwriter. The Complaint alleges the following facts.

On October 7, 1988 Linter Textiles filed an amended registration statement with the Securities and Exchange Commission ("SEC") regarding the issuance of approximately $200 million principal amount of its 13 3/4% Senior Subordinated Debentures, due October 1, 2000 (the "Debentures"). A prospectus dated October 6, 1988 (the "Prospectus") was included in the registration statement and disseminated to the public. The Debentures were delivered against payment on or about October 13, 1988 and bore interest from that date. Complaint ¶ 6. Plaintiffs or their predecessors in interest purchased Debentures in reliance on the representations contained in the

Prospectus. Complaint ¶ 8.

The Prospectus represented that following the public offering, aside from the Debentures, Linter Textiles and its subsidiaries would be relatively free of long-term debt. The Prospectus stated that Linter Textiles would use the proceeds of the sale of the Debentures to retire $A239 million[1] of the then existing $A606 million of long-term debt and to convert $A353 million of the long-term debt into equity, leaving Linter Textiles with only $A14 million of long-term debt. The Prospectus also stated that Linter Textiles expected to arrange $A50 million of bank credit for working capital and $A75 million bank facilities for capital expenditures, and if such

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[1] "$A" is used herein to signify Australian dollars.

funds were provided by Linter Group, Linter Textiles might guarantee the debt incurred by Linter Group to obtain those funds. Complaint ¶ 6.

Plaintiffs allege that the representations in the Prospectus were materially false and misleading in that the Prospectus failed to disclose the following material facts. As of October 6, 1988, pursuant to various agreements (the "Original Guaranties"), several subsidiaries of Linter Textiles (the "Subsidiaries")[2] had guaranteed hundreds

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[2] The Subsidiaries were: Speedo Group Limited, Speedo Knitting Mills PTY Limited, Formfit Holdings Limited, Bradmill Textiles Limited, Bradmill Workwear PTY Limited, National Textiles Limited, Pelaco Australia (Holdings) Limited, Australian Consolidated Hosiery (Holdings Limited), Kortex Australia (Holdings) Limited, Jacquard Fabrics (Holdings) Limited, The Stubbies Clothing Company Limited, King Gee Clothing Company Limited, Kotara Limited, Speedo International BV and Toronto Fashions

of millions of dollars of Linter Group's debt to the Bank Defendants (the "Linter Group Debt"). On October 12, 1988, the day before the delivery of the Debentures, Linter Group, the Subsidiaries, and each of the Bank Defendants executed identical agreements which released the Subsidiaries from the Original Guaranties (the "Releases"). However, at the time the Releases were executed, it was agreed that shortly thereafter Linter Textiles would guaranty the Linter Group Debt to the Bank Defendants under agreements among Linter Group, Linter Textiles, and each of the Bank Defendants. These agreements (the "Linter Textiles Guaranties") are alleged to have been executed between October 26 and November 4, 1988. Complaint ¶ 7.

(Holdings) Limited.

Plaintiffs also allege that at the time the Releases were executed, it was agreed that between October 27 and November 18, 1988, the Subsidiaries would execute identical agreements which guaranteed the Linter Group Debt. These identical agreements (the "Subsidiaries New Guaranties") are alleged to have been executed between October 27 and November 18, 1988. Complaint ¶ 7.

Plaintiffs allege that the foregoing facts constitute a fraudulent scheme by the various defendants to induce the purchase of the Debentures. Complaint ¶ 10. They charge that the Bank Defendants knew that the Debentures could not be sold if the Prospectus disclosed the Original Guaranties, and that the Bank Defendants agreed to execute the Releases the day before the Debentures were

delivered so the Prospectus might omit reference to the Original Guaranties. Complaint ¶ 11.

Plaintiffs charge Defendants with conspiracy to violate, aiding and abetting the violation of, and a substantive violation of the Securities Exchange Act of 1934 ("the Exchange Act"), specifically of §§ 10(b), 20 and 27, 15 U.S.C. §§ 78j(b), 78(t), and 78aa, and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

DISCUSSION

I. ORDER IN WHICH MOTIONS SHOULD BE CONSIDERED

Before the Court are five motions: the Bank Defendants' joint motion to dismiss on grounds of forum non conveniens, and the individual motions of Barclays Australia, Chase AMP, Sumitomo, and Security Pacific to dismiss for lack

of personal jurisdiction. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947), the Supreme Court stated, "[T]he doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." This language indicates that a court may not consider a forum non conveniens motion unless there is subject matter jurisdiction over the case, personal jurisdiction over the parties, and proper venue. Accordingly, when a forum non conveniens motion and motions to dismiss for lack of personal jurisdiction are before a court, the court must first consider the jurisdictional objections. See Monsanto International Sales Co., Inc. v. Hanjin Container Lines, Ltd., No. 88 Civ. 1673, 1991 U.S. Dist. LEXIS 14189 at *3 (S.D.N.Y. Oct. 8, 1991) (KMW); C.

Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3828 (1976). Accordingly, this opinion will address the jurisdictional motions before reaching the issue of forum non conveniens.

II. PERSONAL JURISDICTION

A plaintiff has the ultimate burden of establishing jurisdiction over a defendant by a preponderance of the evidence. Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981). However, until an evidentiary hearing on the jurisdictional issue is held, a plaintiff need only make out a prima facie case for jurisdiction through its pleadings and affidavits. Cutco Industries, Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986). Such pleadings and affidavits are to be construed in the

light most favorable to the plaintiff, and all doubts must be resolved in the plaintiffs' favor. Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 7633 F.2d 55, 57 (2d Cir. 1985).

Section 27 of the Exchange Act provides the statutory basis for the exercise of personal jurisdiction in cases brought thereunder.[3] The Second Circuit has interpreted § 27 to extend personal jurisdiction to the full reach

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[3] Section 27 provides in pertinent part:

> Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district or wherever the defendant may be found.

permitted by the due process clause. In the case of a defendant not personally present in the United States at the time of service, the boundaries of this reach are best defined by §§ 35-37 of the Restatement (Second) of Conflict of Laws (the "Restatement"). Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 (2d Cir. 1975), citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-40 (2d Cir. 1972). Sections 35-37 of the Restatement provide three separate grounds for asserting jurisdiction over a defendant: (1) doing business in the state, § 35; doing an act in the state, § 36, and causing effects in the state by an act done elsewhere, § 37.[4] These

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[4] Restatement (Second) § 35 provides:

Doing Business in State.

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(1) A state has power to exercise judicial jurisdiction over an individual who does business in the state with respect to causes of action arising from the business done in the state.

(2) A state has power to exercise judicial jurisdiction over an individual who has done business in the state, but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state.

(3) A state has power to exercise judicial jurisdiction over an individual who does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

Restatement (Second) § 36 provides:

Doing an Act in State.

> (1) A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act.
> (2) A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to other states make the exercise of such jurisdiction unreasonable.

Restatement (Second § 37 Provides;

Causing Effects in State by Act Done Elsewhere.

A state has power to

principles apply to corporations as well as to individuals pursuant to §§ 47-50 of the Restatement. Leasco, 468 F.2d at 1440.

Plaintiffs assert jurisdiction over the moving Defendants based on four theories: (A) that each Defendant is subject to jurisdiction based on the acts committed by its co-conspirators in the United States; (B) that each Defendant meets the "effects test" of § 37 of the Restatement (Second); (C) that each

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> exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

Defendant is doing business in the United States pursuant to § 35 of the Restatement (Second); and (D) that each Defendant should be deemed to be present in the United States because each is a "mere department" of its parent corporations which is present in the United States.

A. Conspiracy Theory

Jurisdiction may exist over each of the moving Defendants based on acts committed by their co-conspirators in the United States pursuant to a conspiracy to defraud. In Leasco, 468 F.2d at 1343, Judge Friendly considered this basis of jurisdiction under § 27 of the Exchange Act and noted, "To be sure, the rule in this Circuit is that the mere presence of one conspirator . . . does not confer jurisdiction over another alleged

conspirator." Judge Friendly found that based on the facts then before the court, the foreign defendant could not be imputed to have knowledge of the conspiracy. He warned, however, that such jurisdiction might be proper in other factual situations.[5] Therefore, Leasco implies that the conspiracy theory

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[5] The Court ruled that the mere partnership relation between two English solicitors, one an absent defendant and one a defendant deemed present in the United States, could not alone support a finding of jurisdiction over the absent alleged conspirator. However, Judge Friendly noted for the Court that a closer relationship between the two parties might lead to a finding of jurisdiction. For example, if the absent defendant was a senior partner in a firm who had delegated duties to his younger partner, the presence of the younger partner might confer jurisdiction over the senior partner pursuant to the conspiracy. With that in mind, the Court vacated the lower court's dismissal of the case for lack of personal jurisdiction with respect to the solicitor and remanded the case to allow for further discovery on the jurisdictional issue.

urged by Plaintiffs is a proper basis for jurisdiction under the Exchange Act.

Many courts in this Circuit have asserted personal jurisdiction over absent defendants pursuant to a conspiracy theory.[6] See e.g., Chrysler

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[6] Although the courts which have found jurisdiction based on this theory were applying New York's long-arm statute, New York Civil Practice Law and Rules ("CPLR") § 302, the theory is equally appropriate when applying § 27 of the Exchange Act. This is so for two reasons. First, § 27 of the Exchange Act was meant to extend personal jurisdiction to the full reach permitted by the due process clause. Leasco, 468 F.2d at 1339. CPLR § 302 does not extend jurisdiction as far as in constitutionally permissible. Banco Ambrosiano S.P.A. v. Artoc Bank & Trust, Ltd., 476 N.Y.S.2d 64, 67 (1984). Therefore, if there is jurisdiction pursuant to CPLR § 302, then such jurisdiction will be constitutional and within the reach contemplated by § 27 of the Exchange Act. Second, the conspiracy theory upon which Plaintiffs rely is really the "doing an act within the state" theory of § 36 of the Restatement (Second) of Conflict of Laws which was endorsed in Leasco. The conspiracy theory is merely a way of imputing acts

Capital Crop. v. Century Power Corp., No. 91 Civ. 1937, 1991 U.S. Dist. LEXIS 16667 (S.D.N.Y. Nov. 15, 1991)(RPP); Grosser v. Commodity Exchange, Inc., 639 F. Supp. 1293 (S.D.N.Y. 1986); Singer v. Bell, 585 F. Supp. 300 (S.D.N.Y. 1984); Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453 (E.D.N.Y. 1984); Dixon v. Mack, 507 F. Supp. 345 (S.D.N.Y. 1980); Socialist Workers Party v. Atty. Gen. of United States, 375 F. Supp. 318 (S.D.N.Y. 1974). However, as the moving Defendants accurately point out, a bland assertion of conspiracy or agency is insufficient to establish jurisdiction on this basis. Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975). Rather, to establish

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done in the state to the out of state conspirator.

jurisdiction on a conspiracy theory, a plaintiff must: (1) make a prima facie factual showing of a conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious action pursuant to the conspiracy in this jurisdiction. Chrysler Capital, 1991 LEXIS 16667 at *15.

1. Prima Facie Showing of Conspiracy

Although courts have disagreed over the necessary elements of a claim for civil conspiracy to violate the federal securities laws, in this Circuit a plaintiff must prove the following elements: (a) a primary violation of the securities laws by another; (b) an agreement between the alleged defendant

conspirator and the primary violator to violate the securities laws; (c) an illegal or fraudulent act committed by the alleged defendant conspirator in furtherance of the conspiracy; and (d) damage to a person not a member of the conspiracy. Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 119 (2d Cir. 1982); Bresson v. Thomson McKinnon Securities, Inc., 641 F. Supp. 338, 348 (S.D.N.Y. 1986); Troyer v. Karcagi, 476 F. Supp. 1142, 1153 (S.D.N.Y. 1979); Eastwood v. Nat'l Bank of Commerce, 673 F. Supp. 1068 (W.D. Okla. 1987); Hill v. Equitable Bank, 655 F. Supp. 631, 645-6 (D.Del. 1987); Hill v. Equitable Bank, 655 F. Supp. 631, 645-6 (D.Del. 1987). See also Patricia A. O'Hara, Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933, 31 U.C.L.A.

L. Rev. 921, 980 (1984). Accordingly, if the Complaint contains each of those elements, then Plaintiffs have made out the required prima facie case.

a. **Primary violation by another**

The Complaint clearly alleges substantive violations of the federal securities laws by Linter Textiles. Linter Textiles filed with the SEC the Prospectus which contained the allegedly false material representations of fact and caused the Prospectus to be disseminated in this district.

b. **Agreement among conspirators**

Plaintiffs allege that on October 12, 1988, the day before the delivery of the Debentures, Linter Group, the Subsidiaries and each of the Bank Defendants executed the identical Releases, releasing the Subsidiaries from

the Original Guaranties of the Linter Group Debt; that at the time the Releases were executed, it was agreed among those defendants that shortly thereafter Linter Textiles would guaranty the Linter Group Debt to the Bank Defendants; and that it was agreed among those defendants that between October 27, 1988 and November 18, 1988, the Subsidiaries would also execute identical guaranties of the Linter Group Debt. Complaint ¶ 7(b)-(d). Plaintiffs further allege that the defendants were engaged in a scheme to defraud by concealing the agreements relating to the guaranties of the Linter Group debt by Linter Textiles and by the Subsidiaries in order to induce the purchase of the Debentures in the public offering. Complaint ¶ 9. Plaintiffs charge that the Bank Defendants agreed to this

conduct because they knew that the Debentures could not be sold if the Prospectus disclosed the Original Guaranties. Complaint ¶ 11.

These allegations are sufficient to charge that the Bank Defendants, as well as Linter Group, Linter Textiles, and the Subsidiaries, were party to agreements to violate the federal securities laws.

c. Illegal or fraudulent act in furtherance of the conspiracy

Each of the Bank Defendants is alleged to have executed a release of the Original Guaranties of the Linter Group Debt prior to the date of the public offering. These releases were executed pursuant to a scheme to defraud the purchasers of the Debentures by replacing the Original Guaranties with new guaranties after the public offering. These promises to replace the Original

Guaranties were not disclosed in the Prospectus and are alleged to have been kept. The Complaint's allegations therefore satisfy the requirement that there have been at least one fraudulent overt act by one of the alleged conspirators in furtherance of the conspiracy.

d. Injury or damage

The Complaint's allegations also satisfy the fourth requirement of damage or injury. It alleges that in reliance on the allegedly fraudulent Prospectus, Plaintiffs or their predecessors-assignors in interest purchased the Debentures and have suffered substantial losses on their purchases and were damaged thereby. Complaint ¶¶ 8, 13.

2. Relationship of the Moving Bank Defendants to the Conspiracy

Plaintiffs not only must allege a

prima facie claim of conspiracy, but also they must allege specific facts warranting the inference that the defendants were members of the conspiracy and set forth evidentiary facts to connect the defendants with transactions occurring in the United States. Chrysler Capital, 1991 LEXIS 16667 at *23; Huang v. Sentinel Gov't Secur., 657 F. Supp. 485, 492 (S.D.N.Y. 1987); Singer v. Bell, 599 F. Supp. 350, 353 (S.D.N.Y. 1984). A bland allegation or assertion of a conspiracy is clearly insufficient. Id. Plaintiffs have satisfied this requirement.

The Prospectus indicates that the proceeds of the sale of the Debentures would be used to repay substantial indebtedness owed by Linter Textiles to creditors, including Linter Group. Bank

Defs. Forum Non Conveniens Motion, Exh. A at 5. Each Bank Defendant must have been aware of a large public sale of Debentures, the proceeds of which would affect substantially the financial situation of one of its significant debtors.

J. Ezra Merkin, the General Partner of Ariel Capital II L.P. and the President of the investment adviser of Ariel Fund Ltd., states that had the Prospectus disclosed the Subsidiaries' Original Guarantees, Linter Textiles would have been revealed as highly leveraged with debt at the time of the public offering.[7] The Releases allowed

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[7] Because this is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) the Court's consideration of material outside the pleadings is proper. Visual Sciences, Inc. v. Integrated Communications Inc., 660 F.2d 56, 58 (2d Cir. 1981). In contrast to a motion to

Linter Textiles to portray itself as a solvent company having minimal debt. Merkin Aff. at 4-5. Mr. Merkin also states that Bank Defendants received substantial benefits from the cash raised by the public offering. Merkin Aff. at 3-5. The Bank Defendants, who were all creditors of Linter Group, are thus alleged to have benefitted from a large injection of cash to Linter Textiles, although the alleged purpose as stated in the Prospectus was to repay debts owed by Linter Textiles to Linter Group.

Such allegations warrant an inference that the Bank Defendants were members of a conspiracy to defraud

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dismiss pursuant to Fed. R. Civ. P. 12(b)(6), such consideration of extra-pleading material does not convert the motion into one for summary judgment. See Kopec v. Coughlin, 922 F.2d 152 (2d Cir. 1991).

purchasers of the Debentures in the United States.

3. **Tortious act by Defendant's Co-conspirator**

The heart of Plaintiffs' allegations is that Linter Textiles, an alleged co-conspirator of the Bank Defendants, made materially false and misleading representations in the Prospectus. Complaint ¶ 7. The Prospectus, which was included in the registration statement filed with the S.E.C., Complaint ¶ 6, was sent to purchasers, some of whom are United States and New York residents. Merkin Aff. at 2.

Accordingly, this Court has personal jurisdiction over the Bank Defendants.

B. Other Theories of Jurisdiction

Because there is personal jurisdiction pursuant to the conspiracy theory, it is not necessary to address

Plaintiffs' other theories.

III. FORUM NON CONVENIENS

A. Legal Standard

In Gulf Oil v. Gilbert, supra, and the companion case of Koster v. (American) Lumbermens Mut. Casualty Co., 330 U.S. 518 (1947), the Supreme Court set forth the rule that a plaintiff's choice of forum should rarely be disturbed on grounds of forum non conveniens. However, when there is an alternative forum to hear the case and when trial in the chosen forum would be oppressive and vexatious to the defendant out of all proportion to the convenience to the plaintiff, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound

discretion, dismiss the case. Gulf Oil, 330 U.S. at 508-9. Accord Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

To guide the trial court's determination, the Supreme Court provided a list of "private interest factors" affecting the convenience of the litigants and a list of "public interest factors" affecting the convenience of the forum. Gulf Oil, 330 U.S. at 508-509. The private interest factors included: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public factors include: (1) the administrative

difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the avoidance of unnecessary problems in conflict of laws or in the application of foreign law; (4) the unfairness of burdening citizens in an unrelated forum with jury duty. Gulf Oil, 330 U.S. at 508. Accord Piper Aircraft, 454 U.S. at 245 n.6.

B. Availability and Adequacy of Alternative Forum

The determination of whether there is an alternative forum involves a consideration of whether the defendant seeking dismissal is amenable to process in the other jurisdiction. However, "[W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative." Piper Aircraft, 454 U.S.

at 255 n.22.

Plaintiffs offer no affidavits contradicting Defendants' proof that Australia is an adequate alternative forum.[8] Instead, Plaintiffs argue that because they seek relief under a federal statute, dismissal on grounds of forum non conveniens is inappropriate because no foreign forum will hear their federal

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[8] Defendants' expert on Australian law states that Australian courts would exercise personal jurisdiction over all of the Defendants. Declaration of John Dyson Heydon of July 29, 1991 ("Dyson Decl.") ¶ 3. The Australian courts have a system of pre-trial discovery, although it is not as broad as that provided for by the Federal Rules of Civil Procedure. Dyson Decl. ¶¶ 8-10. Australian law provides statutory and common law remedies for the sort of fraud alleged in the Complaint. Dyson Decl. ¶¶ 4-6. Other federal courts have found Australia to be an adequate alternative forum and dismissed on grounds of forum non conveniens. See e.g. Interpane Coatings, Inc. v. Australia & New Zealand Banking Group Ltd., 732 F. Supp. 909 (N.D.Ill. 1990).

statutory claims. They point to CL-Alexanders Laing & Cruickshank v. Goldfeld, 709 F. Supp. 472, 481 (S.D.N.Y. 1989), in which Judge Mukasey distinguished those cases in which federal securities law claims are mere "window dressing" from those in which the federal law claims are "the heart of the complaint." In the latter, Judge Mukasey noted, American courts have a strong public interest in ensuring that plaintiffs not be forced to depend on the vagaries of another country's laws. Id. While the distinction is no doubt valid, nothing in Judge Mukasey's opinion suggests that the interest of plaintiffs with federal causes of action in avoiding dismissal on forum non conveniens is so great as to make all foreign fora inadequate per se. That federal law

claims are at the heart of the Complaint here, however, is a factor to be considered by the Court in making its determination. It does not, however, make Australia a per se inadequate forum.

C. Plaintiffs' Choice of Forum

As the Court in Piper noted, there is a strong presumption in favor of a plaintiff's choice of forum, and this choice may be overcome only when the public and private factors set forth in Gulf Oil clearly point towards trial in the alternative forum. Piper, 454 U.S. at 250. Furthermore, in Koster, 330 U.S. at 524, the Court ruled that a plaintiff's choice of forum is entitled to even greater deference when the plaintiffs has chosen its home forum. In any balancing of conveniences, a real showing of convenience by the plaintiff

will normally outweigh the inconvenience the defendant may have shown. Id. As Judge Friendly stated in Leasco, 468 F.2d at 1344, when considering a motion to dismiss for forum non conveniens, "[C]ourts should require positive evidence of unusually extreme circumstances, and should be convinced that material injustice is manifest before exercising any such discretion to deny a citizen of this country access to the courts of this country."

Accordingly, the Bank Defendants have a high hurdle to clear before this Court will dismiss an action brought by a number of United States residents on grounds of forum non conveniens.

D. Private Interest Factors

1. Ease of Access to Sources of Proof

The Bank Defendants assert that

because they dealt with the various Linter companies only in Australia, the documents relating to the banking transactions at issue are located in Australia. The location of documents is a factor to be considered in the forum non conveniens analysis. Calavo Growers of California v. Belgium, 632 F.2d 963, 967 (2d Cir. 1980), cert. denied 449 U.s. 1084 (1981). Nevertheless, in light of the advances in transportation and communication since 1947, the year Gulf Oil was decided, this factor will be accorded less weight in this Court's calculus. See Overseas Programming Co. V. Cinematographische Commerzanstalt, 684 F.2d 232 (2d Cir. 1982); Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62, 65 (2d Cir. 1981).

2. Compulsory Process for Unwilling Witness and Costs and Obtaining Willing Witnesses

The Bank Defendants state that the majority of the witnesses whom they expect to call reside in Australia. These witnesses include numerous current and former employees of the Bank Defendants, employees of the various Linter companies, and the Linter companies' Australian accountants. The Bank Defendants argue that the inability of any of the parties to compel the attendance of the non-party Australian witnesses would prejudice the Bank Defendants. Gulf Oil, 330 U.S. at 51. As well, they claim that the difficulty and expense of transporting willing witnesses from Australia to New York would be disruptive and burdensome and therefore favors dismissal.

Plaintiffs respond that their party witnesses as well as important third party witnesses are located in New York. These third party witnesses, including personnel at Drexel, the underwriter of the Debentures, and at Skadden Arps Slate Meagher & Flom, Linter Textile's counsel, would be beyond the reach of compulsory process if the case were prosecuted in Australia.

A sheer numerical calculus would seem to indicate that Australia would be a more convenient forum than New York for the potential witnesses to this action. However, prosecution in either forum will prohibit compulsory process over some of the possible third party witnesses.

E. Public Interest Factors

1. Court Congestion

There is no delay for trial in this

party, nor has there been for over one year. Upon completion of discovery, this case will be scheduled for an immediate trial. Accordingly, the Court does not consider calendar congestion a factor which favors dismissal.

2. Local Interest in the Controversy

The Bank Defendants argue that because the Complaint alleges fraud against major Australian banking institutions and major Australian companies, Australian courts have a great interest in the resolution of this dispute. While the Australian courts do have an interest in the conduct of Australian businesses, the United States courts easily have as great or a greater interest in this action. This Court has a substantial interest in affording United States citizens a forum, in

enforcing the federal securities laws, and in preserving the integrity of markets for securities in the United States.

Plaintiffs are all investors with principal places of business located in the United States. Pursuant to a registration statement and Prospectus filed with the SEC, they purchased the Debentures in the United States from a United States underwriter. The alleged misrepresentations took place in the United States. The alleged purpose of these misrepresentations was to defraud United States investors. Accordingly, this Court has an interest in overseeing the resolution of this dispute. See Bersch v. Drexel Firestone, 519 F.2d at 993 (anti-fraud provisions of the federal securities laws apply to losses from

sales of securities to U.S. citizen-residents whether or not the acts of material importance occurred in the U.S.); S.E.C. v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117 (S.D.N.Y. 1981)(strength of the U.S. interest in enforcing its securities laws to ensure the integrity of its financial markets "cannot seriously be doubted").

3. **Familiarity With Applicable Law**

As presently framed, this action will require the application of United States securities law, not Australian laws. Accordingly, there is no risk that this Court will have to apply law with which it is not familiar.

4. **Unfair Burden**

Because this suit involves United States plaintiffs and seeks relief for breaches of United States law, there is

no unfairness in burdening the citizens of New York with the obligation of assisting in its resolution.

F. Conclusion

Prosecution of this action in Australia might be somewhat more convenient for the numerical majority of the witnesses involved. The overall expense involved might be less in Australian court than here, and it would clearly be more convenient for the Bank Defendants. Those factors alone, however, are insufficient to deny Plaintiffs their chosen home forum. The Bank Defendants have not met the substantial burden of proof required for this Court to dismiss this case in favor of prosecution in Australia.

CONCLUSION

For the reasons stated above, the

motions to dismiss brought by Barclays Australia, Chase AMP, Sumitomo, and Security Pacific are denied. The Bank Defendants' joint motion to dismiss is also denied.

All counsel are ordered to attend a pre-trial conference on Tuesday, January 28, 1992 at 9:00 a.m. in courtroom 302 to set a schedule for discovery and trial.

IT IS SO ORDERED.

Dated: New York, New York
January 9, 1992

/s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ALLSTATE LIFE INSURANCE CO., An Illinois Corporation, ARIEL CAPITAL II L.P., A Delaware Limited Partnership, ARIEL FUND LTD., A Cayman Island Exempt Corporation, CARMEL FUND LTD., A Cayman Island Exempt Corporation, CARMEL PARTNERS L.P., A Delaware Limited Partnership, COLONIAL DIVERSIFIED INCOME FUND, A Massachusetts Corporation, D & P CBO PARTNERS L.P., A Delaware Limited Partnership, EXECUTIVE LIFE INSURANCE CO., A California Corporation, ITHACA PARTNERS L.P., A Delaware Limited Partnership, LIFE INSURANCE CO. OF THE SOUTHWEST, A Texas Corporation, MT. TAVOR PARTNERS, L.P., A Delaware Limited Partnership, PROSPECT STREET HIGH INCOME PORTFOLIO, INC., A Massachusetts Corporation, PROSPECT INTERNATIONAL HIGH INCOME PORTFOLIO, N.V., A Netherlands Antilles Corporation, UNITED HIGH INCOME FUND INC., A Maryland Corporation, UNITED HIGH INCOME FUND II INC., A Maryland Corporation, UNITY MUTUAL LIFE INSURANCE CO., A New York Corporation,

Plaintiffs,

-against-

LINTER GROUP LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth of Australia,

LINTER TEXTILES CORPORATION LIMITED, A Wholly-Owned Subsidiary Of The Linter Group, A Limited Company Incorporated Under The Laws Of The State of New South Wales In The Commonwealth Of Australia, APPUNGA PTY. LIMITED, A Private Company Incorporated Under The Laws Of The Northern Territory, Australia, BRADMILL TEXTILES LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, BRADMILL WORKWEAR PTY. LIMITED, A Private Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, FORMFIT HOLDINGS LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, HILTON HOSIERY COMPANY LIMITED, Formerly Known As Australian Consolidated Hosiery Limited, A Limited Company Incorporated Under The Laws Of The Northern Territory Of Australia, JACQUARD FABRICS AUSTRALIA LIMITED, Formerly Known As Jacquard Fabric Holdings Limited, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, KING GEE CLOTHING COMPANY, A Limited Company Incorporated Under The Laws Of the Northern Territory, Australia, KORTEX AUSTRALIA (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, KOTARA LIMITED, A Limited Company Incorporated Under The Laws Of the Northern Territory, Australia, NATIONAL TEXTILES LIMITED, A Private Company Incorporated

Under The Laws Of The State Of Victoria In The Commonwealth Of Australia, PELACO AUSTRALIA (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, SPEEDO GROUP LIMITED, A Limited Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, SPEEDO KNITTING MILLS PTY LIMITED, A Private Company Incorporated Under The Laws Of The State Of New South Wales In The Commonwealth Of Australia, SPEEDO INTERNATIONAL B.V., A Limited Company Incorporated Under The Laws Of The Netherlands, STUBBIES CLOTHING COMPANY LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, TORONTO FASHIONS (HOLDINGS) LIMITED, A Limited Company Incorporated Under The Laws Of The Northern Territory, Australia, TERRY AHERN, An Individual, JOHN WILSON BLOOD, An Individual, KATHY R. BOSKOWITZ, An Individual, RONALD M. DEANS, An Individual, ZEV FURST, An Individual, DAVID GALE, An Individual, ABRAHAM GOLDBERG, An Individual, MILES RICHARD GOWTY, An Individual, J.C.M. TABBERS, An Individual, LINDSAY PHILLIP MAXSTED, Receiver And Manager Of Linter Group Limited And Linter Textiles Corporation Limited, JOHN BERESFORD HARKNESS, Receiver And Manager Of Linter Group Limited And Linter Textiles Corporation Limited,

Defendants.

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91 Civ. 1655 (RPP)
OPINION AND ORDER

A P P E A R A N C E S

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ROBERT P. PATTERSON, JR., U.S.D.J.

This is an action for declaratory relief and damages alleging violations of the federal securities laws and various common law claims sounding in fraud and breach of contract. Several defendants move pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for an

order dismissing them from this action for lack of personal jurisdiction. Also before the Court is a motion by various defendants to stay or dismiss this action in favor of pending bankruptcy proceedings in Australia, or, in the alternative, to dismiss this action on grounds of forum non conveniens. For the reasons set forth below, the motion to dismiss for lack of jurisdiction is denied, and the motion to dismiss in favor of the Australian proceedings as a matter of comity is granted.

BACKGROUND

This action arises from the October 13, 1988 sale by Linter Textiles Corporation Ltd. ("Linter Textiles"), an Australian corporation, of approximately $200 million of its 13 3/4% Senior Subordinated Debentures (the

"Debentures").[9] The sale was conducted pursuant to a public offering in the United States, with Drexel Burnham Lambert, Inc. as underwriter.

I. THE PARTIES

The Plaintiffs in this action are all institutional investors with principal places of business in the United States. Plaintiffs purchased, or are successors-in-interest to purchase of, Debentures with a collective face value in excess of $100 million.

Defendant Linter Group Limited ("Linter Group") is a limited company incorporated under the laws of New South

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[9] The facts underlying this lawsuit are essentially the same as those in set forth in this Court's opinion in the related action of Allstate Life Ins. Co. v. Linter Group Ltd., 782 F.Supp. 215 (S.D.N.Y. 1992)("Linter II"). Familiarity with that opinion is presumed.

Wales, Australia. At all relevant times, Linter Group was a holding company owning a number of subsidiary corporations, many of whom, including Linter Textiles, are defendants in this action. On April 12, 1991, Linter Group was placed into liquidation by order of the Supreme Court of New South Wales, Australia. The court appointed Defendants Guy Philip Maxsted and John Philip Harkness to be the liquidators of Linter Group.[10]

Linter Textiles, a wholly-owned subsidiary of Linter Group, is also a limited company incorporated under the laws of New South Wales. At all relevant

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[10] Messrs. Maxsted and Harkness are sued only in their official capacities as liquidators and managers of Linter Group and, as described below, in their official capacities as liquidators and managers of Linter Textiles and its subsidiary corporations.

times, Linter Textiles was a holding company which owned various subsidiary corporations ("the Subsidiaries") who were involved in the textiles industry and who are defendants in this action. On August 19, 1991, Linter Textiles was placed into liquidation by order of the Supreme Court of New South Wales. In September, 1991, all but one of the Subsidiaries were also placed into liquidation. Messrs. Maxsted and Harkness were appointed by that court to be the liquidators of Linter Textiles and the Subsidiaries.

The remaining individual defendants were at relevant times either directors or officers of the various Linter companies.

II. PLAINTIFFS' CLAIMS

On October 7, 1988, in connection

with the public offering of the Debentures, Linter Textiles filed an amended registration statement (the "Registration Statement") with the Securities and Exchange Commission (the "SEC"). A prospectus dated October 6, 1988 (the "Prospectus") was disseminated to purchasers. Plaintiffs' claims are based on alleged misrepresentations and omissions in the Registration Statement, the Prospectus, and Linter Textiles' first Annual Report issued on September 14, 1989.

In particular, Plaintiffs rely on statements in the Registration Statement and Prospectus that of Linter Textiles' then existing long-term debt of $A606 million,[11] $A353 million would be

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[11] "$A" is used herein to denote Australian dollars.

converted into equity and $A239 million would be repaid with the proceeds of the public offering. The Registration Statement and Prospectus represented that after the sale of the Debentures, Linter Textiles would have outstanding only about $A14 million of long-term debt.

Prior to the public offering, the Subsidiaries were guarantors of approximately $A323 million of Linter Group's outstanding debt (the "Linter Group Debt") to nine banks (the "Creditor Banks"). On October 12, 1988, the day before the Debentures were to be delivered, Linter Group, Linter Textiles, and the Subsidiaries executed agreements (the "Releases") which released the Subsidiaries from their original guaranties (the "Original Guaranties") of the Linter Group Debt. Plaintiffs allege

that at the time the Releases were signed, the parties had agreed (1) that after the sale of the Debentures Linter Textiles and the Subsidiaries would reassume their guaranties, and (2) that pursuant to that agreement, new guaranties (the "Replacement Guaranties") were put in place within weeks after the public offering. None of these plans were disclosed in the Prospectus or the Registration Statement, and Plaintiffs claim that they would not have purchased the Debentures had this information been disclosed.

Based on these alleged misrepresentations and omissions, Plaintiffs assert the following claims for relief:

(1) against Linter Textiles and the defendant Officers and Directors of Linter Textiles for damages pursuant to § 11 of

the Securities Act of I933 ("'33 Act"), 15 U.S.C. § 77k;

(2) against Linter Textiles for rescission pursuant to § 12(2) of the '33 Act, 15 U.S.C. § 771(2);

(3) against Linter Group and the defendant Officers and Directors of Linter Group for a declaration of joint and several liability for any recovery under § 11 and § 12 of the '33 Act pursuant to § 15 of the '33 Act, 15 U.S.C. § 77o;

(4) against Linter Textiles, the defendant Officers and Directors of Linter Textiles, Linter Group, and defendant Officers and Directors of Linter Group for fraud pursuant to § 17(a)(1)-(3) of the '33 Act, 15 U.S.C. § 77q(1)-(3);

(5) against Linter Textiles, the defendant Officers and Directors of Linter Textiles, Linter Group, and the defendant Officers and Directors of Linter Group for fraud pursuant to Rule 10b-5, 17 C.F.R. § 240-10b-5, promulgated under § 10(b) of the Securities Exchange Act of 1934 ("the '34

Act"), 15 U.S.C. § 78j(b);[12]

(6) against Linter Textiles, the defendant Officers and Directors of Linter Textiles, Linter Group, and the defendant Officers and Directors of Linter Group for violation of the Martin Act, N.Y.Gen. Bus. Law § 352;

(7) against Linter Textiles for common law rescission;

(8) against Linter Textiles, the defendant Officers and Directors of Linter Textiles, Linter Group, and the defendant Officers and Directors of Linter Group for common law fraud;

(9) against Linter Textiles for breach of indenture;[13]

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[12] The Complaint alleges a violation of 15 U.S.C. § 77j(b), but the Court assumes this is a typographical error.

[13] The breach of indenture and other contractual claims arise from the October 1, 1988 Indenture between Linter Textiles and United States Trust Company of New York. Plaintiffs assert that Linter Textiles breached its duty under the Indenture to observe the following covenants: to

(10) against Linter Group and the defendant Officers and Directors of Linter Group for intentional interference with contractual relations;

(11) against the Subsidiaries for intentional interference with contractual relations;

(12) against Linter Group for fraudulent conveyance;

(13) against Linter Textiles, the defendant Officers and Directors of Linter Textiles, Linter Group, the defendant Officers and Directors of Linter Group, and the Subsidiaries for conspiracy;

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make principal and interest payments on the Debentures; not to permit the Textile Subsidiaries to issue guaranties on behalf of Linter Textiles; not to incur "Funded Debt" (as defined by the Indenture) unless Linter Textiles enjoyed certain specified cash flow ratios; and not to guaranty the obligations of an affiliate or to permit the Textile Subsidiaries to guaranty the obligation of an affiliate on terms less favorable than the affiliate could expect to obtain from a third party.

and

(14) against Linter Group, Linter Textiles, and the Subsidiaries for a declaration that any damages sustained by Plaintiffs are not subordinated to the senior indebtedness of either Linter Group, Linter Textiles, or the Subsidiaries.

III. RELATED LITIGATION

There are several related pending actions which are based on the same events as the Complaint.

A. Linter II, which is also before this Court, is an action brought by Plaintiffs against Linter Group, Linter Textiles, and eight of the nine Creditor Banks alleging securities fraud.

B. The various Linter companies are the subject of the above noted Australian bankruptcy proceedings. Plaintiffs have participated in this proceedings.

C. Eight months after this action was filed, Plaintiffs brought an action in

Australian Federal Court in which they seek substantially the same relief as that requested here (the "Australian Federal Court Action"). The Australian Federal Court Action was filed with the permission of the Australian bankruptcy court, but Plaintiffs have not been granted leave to proceed further.

D. Plaintiffs have filed a declaratory judgment action before a trial court in New South Wales seeking a declaration that Linter Textiles' obligations to the holders of the Debentures are not subordinated to its obligations to the Creditor Banks. That action is based on facts not alleged in this action, but rather seeks a construction under Australian law of certain provisions of the Indenture. Pl. Mem. at 15-16.

DISCUSSION

I. PERSONAL JURISDICTION

The Liquidators (on behalf of Linter Group) and the Subsidiaries move to dismiss the Complaint against them for lack of personal jurisdiction. In response to a similar motion brought by the defendants in Linter II, the Court ruled that the defendant Creditor Banks were subject to the Court's personal jurisdiction "based on acts committed by their co-conspirators in the United States pursuant to a conspiracy to defraud." Linter II, 782 F.Supp. at 220 (collecting cases).

Plaintiffs here allege the existence of a conspiracy among Linter Group, its subsidiaries and affiliates, and various officers and directors to violate the federal securities laws. Complaint ¶¶

119-124. In Linter II, 782 F.Supp. at 221, the Court ruled that "a bland assertion" is insufficient to establish jurisdiction on the basis of a conspiracy. Rather, the Court articulated a three-part test to guide the determination of whether jurisdiction exists based on a conspiracy theory:

> (1) the plaintiff must make a prima facie factual showing of a conspiracy;
>
> (2) the plaintiff must allege specific facts warranting the inference that the defendant was a member of the conspiracy; and
>
> (3) the plaintiff must show that the defendant's co-conspirator committed a tortious act in this jurisdiction pursuant to the conspiracy.

Id. at 221. An analysis of the Complaint and the material submitted in connection

with this motion[14] indicates that the Court has personal jurisdiction over Linter Group and the Subsidiaries.

A. Prima Facie Showing of Conspiracy

In this Circuit, to state a claim for civil conspiracy to violate the federal securities laws, a plaintiff must allege the following: (1) a primary violation of the securities laws by another, (2) an agreement between the alleged defendant conspirator and the primary violator to violate the securities laws; (3) an illegal or fraudulent act committed by the alleged defendant conspirator in furtherance of

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[14] Because this is a motion to dismiss pursuant to Fed.R. Civ. P. 12(b)(2), the consideration of extra-pleading material is proper. Visual Sciences, Inc. v. Integrated Communications, 660 F.2d 56, 58 (2d Cir. 1981).

the conspiracy; and (4) damage to person not a member of the conspiracy. Linter II, 782 F.Supp. at 221 (collecting cases).

1. **Primary violation of the securities laws**

The Complaint clearly alleges substantive violations of the federal securities laws by Linter Textiles. Linter Textiles issued the Registration Statement, Prospectus, and Annual Report containing the misrepresentations and omissions upon which Plaintiffs' claims are based. Complaint ¶¶ 34, 45, 59, 62.

2. **Agreement among conspirators**

The Complaint alleges that on October 12, 1988, the day prior to the delivery of the Debentures, Linter Textiles, the Subsidiaries, and the Creditor Banks signed the Releases, releasing Linter Textiles and the

Subsidiaries from the Original Guaranties. Complaint ¶ 25. The Releases were also signed by Linter Group. Affidavit of John Harnes, sworn to on February 6, 1992 ("Harnes Aff."), Exh. I. Plaintiffs charge that the Registration Statement and Prospectus failed to disclose Linter Textiles' then existing intent to replace the Original Guaranties after the sale of the Debentures. Complaint ¶¶ 24-26, 41. Plaintiffs allege that the Replacement Guaranties were put in place shortly after the sale of the Debentures. Complaint ¶ 25.

These allegations support the inference that the various Linter companies and their respective officers and directors conspired to conceal from purchasers of the Debentures their plan

to remove the Original Guaranties with the understanding that the Replacement Guaranties would be put in place after the sale of the Debentures. Accordingly, Plaintiffs have alleged that Linter Group and the Linter Subsidiaries were parties with Linter Textiles to an agreement to violate the federal securities laws. See Linter II, 782 F.Supp. at 222.

3. Illegal or fraudulent act

Plaintiffs charge that Linter Textiles and each of the Subsidiaries executed the Releases pursuant to the scheme to defraud the purchasers of the Debentures. Complaint ¶ 25. As noted above, Linter Group was also a signatory to the Releases. Such acts are sufficient to satisfy the requirement that there have been at least one fraudulent act by one of the conspirators

in furtherance of the conspiracy. See Linter II, 782 F.Supp. at 222.

4. **Injury or damage**

The Complaint alleges that in reliance on the fraudulent statements made by Linter Textiles, Plaintiffs or their predecessors-in-interest purchased the Debentures, and Plaintiffs have thereby suffered substantial losses. Complaint ¶¶ 27, 31-32; Complaint at pp. 50-55.

Accordingly, Plaintiffs have pled all four of the requisite elements of a claim of civil conspiracy to violate the federal securities laws.

B. **Relationship of Linter Group and the Subsidiaries to the Conspiracy**

To assert jurisdiction on this basis, a plaintiff not only must state a prima facie claim of conspiracy, but also must allege specific facts warranting the

inference that the defendant was a member of the conspiracy and set forth evidentiary facts to connect the defendant with transactions occurring in the United States. Linter II, 782 F. Supp. at 222

The Complaint alleges that through a group of common or shared directors, Linter Group controlled both Linter Textiles and the Textile Subsidiaries; that Linter Group directed and authorized Linter Textiles to prepare, file, and disseminate the fraudulent Registration Statement, Prospectus, and Annual Report; and that Linter Group directors had actual knowledge of the alleged misrepresentations and omissions in the Registration Statement, Prospectus, and Annual Report. Complaint ¶¶ 48-51. These allegations support the inference

that Linter Group and its directors participated in the alleged conspiracy to violate the federal securities laws.

An equally strong inference of participation can be drawn with regard to the Subsidiaries. The Subsidiaries also had common directors with Linter Textiles and Linter Group, and an examination of the Releases indicates that the same directors signed on behalf of both Linter Group and the Subsidiaries. Harnes Aff., Exh. I. The Subsidiaries are alleged to have executed the Releases just prior to the delivery of the Debentures and to have executed the Replacement Guaranties shortly after the Debentures were sold. Complaint ¶ 25. These facts support the inference that the Subsidiaries were participants in the alleged conspiracy.

C. Tortious Act by Defendants' Co-conspirator in the United States

The heart of Plaintiffs' allegations is that Linter Textiles, an alleged co-conspirator of Linter Group and the Subsidiaries, made materially false and misleading representations and omissions in the Registration Statement, Prospectus, and Annual Report. All of those documents were filed in the United States with the SEC. Complaint ¶¶ 19, 27; Harnes Aff. Exh. A. In addition, the Prospectus was prepared and disseminated by Linter Textiles' United States underwriter, and it was received by Plaintiffs, all of whom have principal places of business in the United States. Complaint, ¶¶ 7, 39, 58. Thus, Plaintiffs have alleged tortious conduct by a co-conspirator within the United States.

Accordingly, because Plaintiffs' allegations meet all three parts of the test outlined in Linter II, this Court has jurisdiction over Linter Group and the Subsidiaries based on a theory of conspiracy.

II. COMITY

The Liquidators (on behalf of Linter Group), Linter Textiles, the Subsidiaries, and Defendant John Wilson Blood move jointly to stay or dismiss this action in favor of the Australian bankruptcy proceedings, or in the alternative, to dismiss this action on grounds of forum non conveniens. By urging this Court to abstain in favor of the Australian bankruptcy proceedings, Plaintiffs request this Court to grant

comity to those proceedings.[15]

In Hilton v. Guyot, 159 U.S. 113, 164 (1895), the Supreme Court defined comity as:

> the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

In Cunard Steamship Co. v. Salen Reefer Services AB, 773 F.2d 452 (2d Cir. 1985),

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[15] On March 20, 1992, the Court issued an Order requesting additional briefs on the issue of whether "the pending Australian bankruptcy proceedings are being conducted in an unfair manner which is prejudicial to Plaintiffs' claims in that proceeding." Allstate Life Ins. Co. v. Linter Group Ltd., No. 91 Civ. 1655 (S.D.N.Y. Mar. 20, 1992). Thereafter, on April 7, 1992, Plaintiffs and Defendants each filed a supplemental memorandum of law pursuant to the Court's request.

the Second Circuit recognized a public interest in granting comity to foreign bankruptcy proceedings by staying or enjoining the commencement or continuance of an action against a debtor or its property:

> The granting of comity enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.

Id. at 458.

In order for comity to be extended, however, "the foreign court must abide by fundamental standards of procedural fairness." Id. at 457. In determining whether foreign insolvency proceedings warrant comity, courts have focused on several factors as indicia of procedural

fairness, including:

(1) whether creditors of the same class are treated equally in the distribution of assets, Cunard, 773 F.2d at 459-460;

(2) whether the liquidators are considered fiduciaries and are held accountable to the court, Cunard, 773 F.2d at 459;

(3) whether the creditor has the right to submit a claim and, if his claim is disallowed, whether he can submit it to the bankruptcy court for adjudication, Cunard, 773 F.2d at 459; In re Gercke, 122 B.R. 621, 629 (Bankr. D.D.C. 1991);

(4) whether the liquidators are required to give notice to the debtors' potential claimants and whether there are provisions for creditors meetings, Cunard, 773 F.2d at 459;

(5) whether a foreign country's insolvency laws favor its own citizens, Cunard, 773 F.2d at 459-60; In re Gee, 53 B.R. 891, 903 (Bankr. S.D.N.Y. 1985);

(6) whether all assets are marshalled before one body for centralized distribution, Gee, 53 B.R. at 903; and

(7) whether automatic stay provisions exist to facilitate the centralization of claims, and

whether appropriate procedures exist for lifting such stays under appropriate circumstances. Gercke, 122 B.R. at 629; Cunard, 773 F.2d at 459; Gee, 53 B.R. at 903.

The Declaration of Stephen Peter Sawer, a member of the Melbourne firm of Phillips Fox, Solicitors, indicates that Australian insolvency law satisfies all seven of these factors.

(1) All creditors of the same class are treated equally.

(2) Liquidators are appointed by the court, and they must act in accordance with court directions and procedures.

(3) After assets are liquidated, Australian law lays down a procedure for calling of proofs of debt. The liquidator adjudicates those proofs of debt subject to a creditor's right to appeal to a supervising court.

(4) The procedures for calling of proofs of debt include notice through the placing of advertisements. Australian law provides for the appointment of a committee of creditors to advise the liquidator.

(5) Foreign parties may file claims in insolvency proceedings, and Australian claimants are given no priority over foreign claimants.

(6) Australian insolvency law provides for the centralization of all of the debtor's assets.

(7) Section 371(2) of the Companies (New South Wales) Code[16] provides for an automatic stay of litigation upon order for the winding up of a company. A creditor who wishes to proceed with an action independent of the liquidation proceeding may obtain leave of court to do so.

Declaration of Stephen Peter Sawer, sworn to on December 12, 1991 ("Sawer Decl."), ¶¶ 8, 9, 12, 13.

Plaintiffs' responses fail to

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[16] Effective January, 1991, the Companies Code was replaced by the Corporations Law, and the new law governs the liquidation proceedings involving Linter Textiles. Section 471(2) of the Corporations Law is the successor to § 371(2) of the Companies Code. Declaration of John Frederick Warburton, sworn to on February 6, 1992, ¶¶ 3, 7.

controvert these assertions or otherwise to show the existence of procedural unfairness in Australian bankruptcy proceedings. First, Plaintiffs assert unfairness on the ground that:

> the Liquidators proposed a scheme of arrangement that would have limited plaintiff debentureholders' ability to pursue their claims, and obtained approval of that scheme by putting the Creditor Banks in the same class of creditors as plaintiffs, despite their adverse interests, in order to enable the banks to outvote the plaintiffs.

Pl. Supp. Mem. at 3. Plaintiffs admit, however, that this allegedly prejudicial scheme was withdrawn "after the scheme was vigorously opposed by debentureholders." Id. Accordingly, the proposed scheme no longer presents a risk of unfairness to Plaintiffs.

Second, Plaintiffs note that under Australian law a bare right to sue is not assignable; only a right to sue

incidental to the assignment of property may be validly assigned. J.G. Starke, Assignment of Choses in Action in Australia 62-63 (1972). Plaintiffs state that because they expect the Liquidators to argue that the assignments of the Debentures to Plaintiffs are mere assignments of rights to sue and therefore invalid, there is a risk of substantive unfairness to Plaintiffs in the Australian bankruptcy proceedings. Pl. Supp. Mem. at 5. Plaintiffs, however, are all either purchasers of or assignees of purchasers of the Debentures. The Court cannot see any conceivable basis for finding that any Plaintiff is the assignee of a bare right to sue. Thus, the likelihood that the Liquidators could successfully argue that Plaintiffs have no right to sue under

Australian law appears too small to warrant concern.

Third, Plaintiffs assert unfairness in light of United States Surgical Corp. v. Ballabil Holdings Pty. Ltd., 4 A.C.L.R. 639, 640 (1986), wherein the Supreme Court of New South Wales Australia ruled that the automatic stay provision of § 371(2) of the Companies (New South Wales) Code did not bar the litigation of an action against a debtor-in-bankruptcy in the United States District Court for the District of Connecticut. Plaintiffs assert that by refusing to apply § 371(2) to foreign proceedings, the U.S. Surgical court implicitly recognized the existence of unfairness to foreign creditors in Australian bankruptcy proceedings. Pl. Supp. Mem. at 5-6.

The Court disagrees. In U.S. Surgical, the court construed the plaint language of § 371(2) to extend only to actions in New South Wales. 4 A.C.L.R. at 639. Nothing in the court's decision suggests a judicial or legislative recognition of unfairness to foreign litigants. In fact, the court noted that it "would have jurisdiction in a proper case to make an order in personam to restrain a person amenable to the jurisdiction of this Court from commencing or continuing with proceedings in a foreign court." Because no such application had been made in the case before it, however, the court declined to issue such a restraining order.[17] Id. at

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[17] Contrary to Plaintiffs' assertions, the court's dictum indicates that § 371(2) is analogous to the automatic stay provision of the United States

640.

In further opposition to the granting of comity, Plaintiffs rely on Interpool Ltd. v. Certain Freights of M/V Venture Star, 102 B.R. 373 (D.N.J. 1988), wherein the court refused to grant comity to an Australian bankruptcy proceeding because it could not conclude that the foreign proceeding would afford sufficient procedural protections to United States creditors. The Interpool court based its decision not on a belief that Australian bankruptcy proceedings

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Bankruptcy Code. That provision, 11 U.S.C. § 362 permits the enforcement of the automatic stay only with respect to creditors who are subject to the in personam jurisdiction of the bankruptcy court. See In re Fotochrome Inc., 377 F.Supp. 26, 28-29 (E.D.N.Y. 1974), aff'd sub nom. Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975).

were inherently unfair to foreign creditors, but rather on its specific findings that (1) the liquidator had agreed to pay out $6 million of the estate to one creditor, and (2) that the Australian court had failed to give notice to the United States creditors before ratifying the agreement. 102 B.R. at 379-80. Here, by contrast, there is no allegation that the Liquidators have entered into special deals or arrangements with any of the Australian creditors or that Plaintiffs have been denied notice with respect to any of the bankruptcy court proceedings. Accordingly, Interpool offers no support for Plaintiffs' position.

Plaintiffs also rely on In re Petition of Banco Nacional de Obras y Servicios Publicos, S.N.C., 91 B.R. 661

(Bankr. S.D.N.Y. 1988), where the court refused to grant comity to a Mexican bankruptcy proceeding. The court based its decision on its belief that resolution of the controversy would require construction of issues of labor law, "a specialized area of the law laced with strong policy considerations." Id. at 667. Thus, the court found that the United States creditors:

> will be severely prejudiced both if they must litigate individually their claims emanating from a disputed collective bargaining agreement in Mexico and if the Mexican bankruptcy court is called upon to construe and apply American labor law in an area in which traditional contract principles are not strictly applied and in which policy considerations abound.

Id. at 667-68.

Here, Plaintiffs' allege violations of the federal securities laws, also "a specialized area of the law laced with

strong policy considerations." Id. at 667. However, Plaintiffs' claims do not require application of an area of law in which traditional legal principles are not applied. Australian law recognizes fraud claims in a manner similar to United States law, and Plaintiffs have not shown that the Australian courts are ill-suited to resolve their claims. See Sawer Decl. ¶¶ 21-27.

Lastly, Plaintiffs note that § 471(2) of the Corporations Law provides that the bankruptcy court may grant leave for the prosecution of complex or multi-party claims in a separate forum. Plaintiffs believe that due to the complexity of their claims, the Australian bankruptcy court most likely will permit the separate prosecution of their claims in the Australian Federal

Court Action. Warburton Aff., ¶¶ 8-14. Thus, Plaintiffs argue that Defendants' comity motion is really a forum non conveniens motion in disguise and should be treated as such. Pl. Mem. at 24-25. The Court disagrees. That the Australian bankruptcy court may, as a matter of procedural efficiency, defer to another tribunal more suited to adjudicate Plaintiffs' complex claims does not mean that this is a forum non conveniens motion. The Court grants comity to the Australian bankruptcy proceedings not because it believes that the Australian Federal Court is a more convenient forum, but because it recognizes and respects the policy rationale in deferring to foreign insolvency proceedings.[18]

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[18] The instant action, which is brought against the various Linter companies, is akin to a

Cunard, 773 F.2d at 458.

III. FORUM NON CONVENIENS

Because the Court dismisses this action on grounds of comity, it need not address Defendants' forum non conveniens motion.

"core proceeding," whereas Linter II, which is essentially an action against the Creditor Banks, is akin to a "non-core proceeding" under the Bankruptcy Code. See 28 U.S.C. § 157. Furthermore, Plaintiffs admit that "by this lawsuit, plaintiffs seek to obtain a judgment that will provide the basis for them to file a proof of dividend in the Australian liquidation proceedings that is not subordinated to those claims of the Creditor Banks." Pl. Mem. at 3. Thus, the dismissal of these claims in favor of adjudication in the Australian bankruptcy court, even though Linter II remains before this Court, conforms with the policies expressed in the Bankruptcy Code and in Cunard.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss this action on grounds of comity is granted.

IT IS SO ORDERED.

Dated: New York, New York
June 1, 1992

\s\ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ALLSTATE LIFE INSURANCE CO., et al.,

Plaintiffs,

-v-

LINTER GROUP LIMITED, et al.,

Defendants.
----------X

91 Civ. 1655 (RPP)

ORDER

A P P E A R A N C E S

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ROBERT P. PATTERSON, JR., U.S.D.J.

By Opinion and Order entered June 1, 1992, this Court granted Defendants' motion to dismiss this action, on grounds of comity, in favor of ongoing liquidation proceedings in Australia. Allstate Life Inc. Co. v. Linter Group Ltd., No. 91 Civ. 1655, 1992 U.S. Dist. LEXIS 7723 (S.D.N.Y. June 1, 1992). Plaintiffs now move pursuant to Rule 59(e) of the Federal Rule of Civil Procedure for an order amending this Court's judgment: (1) to stay this action, except to permit discovery, or (2) in the alternative, to condition

dismissal of this action upon Defendants' agreement to afford Plaintiffs discovery by any of the methods permitted by Rule 26 of the Federal Rules of Civil Procedure.

Plaintiffs admit that they seek amendment of the judgment herein solely to allow them to take discovery from certain of the Defendants in this action for use in a related action before this Court to which those Defendants are not parties. See Allstate Life Ins. Co. v. Linter Group Ltd., No. 91 Civ. 2872 (RPP). Plaintiffs fail, however, to articulate any basis for this Court to retain jurisdiction over a foreign defendant solely for the purpose of allowing discovery for use in a separate action to which that defendant is not a party. Plaintiffs also fail to show that

the discovery of the Defendants at issue which is available pursuant to ongoing proceedings in Australia will be unsatisfactory.

Accordingly, Plaintiffs' motion is denied.

IT IS SO ORDERED.

Dated: New York, New York
September 3, 1992

\s\ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ALLSTATE LIFE INSURANCE CO., ARIEL CAPITAL II L.P., ARIEL FUND LTD., CARMEL FUND LTD., CARMEL PARTNERS L.P., COLONIAL DIVERSIFIED INCOME FUND, D & P CBO PARTNERS L.P., EXECUTIVE LIFE INSURANCE CO., ITHACA PARTNERS L.P., LIFE INSURANCE CO. OF THE SOUTHWEST, MT. TAVOR PARTNERS, L.P., PROSPECT STREET HIGH INCOME PORTFOLIO, INC., PROSPECT INTERNATIONAL HIGH INCOME PORTFOLIO, N.V., UNITED HIGH INCOME FUND INC., and UNITED HIGH INCOME FUND II INC.,

Plaintiffs,

-against-

LINTER GROUP LIMITED, LINTER TEXTILES CORPORATION LIMITED, LINDSAY PHILLIP MAXSTED, RECEIVER AND MANAGER OF LINTER GROUP LIMITED AND LINTER TEXTILES CORPORATION LIMITED, JOHN BERESFORD HARKNESS, RECEIVER AND MANAGER OF LINTER GROUP LIMITED AND LINTER TEXTILES CORPORATION LIMITED, ABRAHAM GOLDBERG, COMMONWEALTH BANK OF AUSTRALIA, BANK OF NEW ZEALAND, SUMITOMO INTERNATIONAL FINANCE AUSTRALIA LIMITED, CHASE AMP BANK LIMITED, BARCLAYS BANK AUSTRALIA LIMITED, STATE BANK OF SOUTH AUSTRALIA, SECURITY PACIFIC AUSTRALIA LIMITED, AUSTRALIA

AND NEW ZEALAND BANKING GROUP LIMITED and WESTPAC BANKING CORPORATION,

Defendants.

91 Civ. 2873 (RPP)
OPINION AND ORDER

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ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiffs bring this action seeking damages for violations of federal securities laws. Defendants Linter Group Limited, Linter Textiles Corporation Limited, Lindsay Philip Maxsted, and John Beresford Harkness ("the Linter Defendants") move to dismiss the claims against them as a matter of comity in favor of ongoing liquidation proceedings in Australia. Defendants Barclays Bank Australia Limited, Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, State Bank of South Australia, Westpac Banking

Corporation, Sumitomo International Finance Australia Limited, Bank of New Zealand, Security Pacific Australia Limited, and Chase AMP Bank Limited ("the Bank Defendants") move to dismiss the complaint in this action on the ground of forum non conveniens. For the reasons set forth below, both motions are granted.

BACKGROUND

I. THIS ACTION

Familiarity with the facts giving rise to this action, as recounted in this Court's decision of January 9, 1992, is presumed. See Allstate Life Ins. Co. v. Linter Group Ltd., 782 F.Supp. 215 (S.D.N.Y. 1992).

By way of review, the plaintiffs are corporations and limited partnerships having their principal places of business

in the United States. The Linter Defendants consist of two Australian corporations and the individuals appointed to serve as their receivers and managers. The Bank Defendants include nine separate Australian and New Zealand financial institutions.

This action arises from Plaintiffs' purchase of subordinated debentures issued by Defendant Linter Textiles Corporation Limited ("LTCL") in October 1988. Plaintiffs allege that they made these purchases in reliance upon a prospectus issued by LTCL and dated October 6, 1988, which failed to disclose arrangements between subsidiaries of LTCL, Linter Group Limited, and the Bank Defendants that would reorganize LTCL's long-term debt. The Complaint in this action, filed on April 26, 1991, charges

the defendants with conspiring to violate, aiding and abetting the violation of, and substantively violating the Securities Exchange Act of 1934. The Bank Defendants have asserted cross-claims against LTCL and Linter Group Limited for contribution.

II. RELATED LITIGATION

On March 8, 1991, prior to filing this action ("Linter II"), Plaintiffs instituted an action ("Linter I") against the Linter defendants, sixteen subsidiaries of LTCL, and various officers and directors of the Linter companies. Like Linter II, Linter I involved claims pursuant to Section 10(b) and Rule 10b-5 of the federal securities laws arising out of the October 1988 issue of subordinated debentures by LTCL. This Court dismissed Linter I on grounds

of comity because the Linter companies were the subject of liquidation proceedings in Australia. See Allstate Life Ins. Co. v. Linter Group Ltd., [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,864 (S.D.N.Y. June 1, 1992).

Linter Group Limited and LTCL were placed into liquidation by orders of the Supreme Court of New South Wales dated April 12, 1991, and August 19, 1991, respectively. Plaintiffs, as creditors of LTCL, are participants in the liquidation proceedings.

Plaintiffs are also pursuing their claims against the defendants in two additional actions in the courts of Australia. First, they brought an action against the Linter Defendants, the Bank Defendants, and over thirty other parties in Australian Federal Court seeking

substantially the same relief as requested here. As the parties have informed this Court, that action (the "Australian Federal Court action") has not yet proceeded beyond the filing of the complaint because the Australian liquidation court has yet to take the necessary step, required by Australian law, of granting leave to proceed. Second, Plaintiffs filed an action before the Equity Division of the Supreme Court of New South Wales (the "equity proceeding") seeking a declaratory judgment that Plaintiffs' claims against LTCL are not subordinated to the claims of LTCL's lenders.

On October 9, 1992, the judge presiding over the Australian equity proceeding granted the Bank Defendants leave to file cross-claims, by which they

are requesting a declaration that the indenture and other instruments purporting to subordinate the plaintiffs' debentures to other debt of the Linter companies are valid and enforceable. Plaintiffs opposed the Bank Defendants' application for permission to file cross-claims on the ground that "some of the matters sought to be raised by the cross-claims may involve the plaintiffs raising by way of defence issues equivalent to those the subject of the Linter I and Linter II actions and the Federal Court proceedings." United States Trust Co. of New York v. Australia & New Zealand Banking Group Ltd., No. 6238/91, slip op. at 2 (Sup. Ct. of New South Wales, Equity Div., Oct. 9, 1992). In allowing the Bank Defendants to file their cross-claims, the Court stated:

> [I]t is my intention that the present proceedings be confined to the determination of questions relating to the construction and legal effect of the 1 October 1988 indenture and ancillary documents, without prejudice to any claim for statutory relief of a discretionary nature to avoid the effect of any such determination.

Id. at 4. The Court also indicated that "it might well ultimately be convenient to hear [such a claim for statutory relief] in conjunction with the Federal Court proceedings." Id. at 3.

On the same day, the judge in the Australian liquidation proceedings denied Plaintiffs' application for an order granting leave to proceed with Linter I and Linter II in this Court. In re Linter Textiles Crop. Ltd., No. 1221/90, slip op. at 2-3 (Sup. Ct. of New South Wales, Equity Div., Oct. 9, 1992). The Australian Court explained that it "has no power to make thee orders." Id. at 3.

The Linter Defendants now move this Court to dismiss the complaint against them on the ground that the considerations of comity underlying this Court's dismissal of Linter I apply equally here. In addition, the Bank Defendants move to dismiss this action based on forum non conveniens. On January 9, 1992, this Court denied a prior motion by the Bank Defendants for dismissal on identical grounds. Allstate Life Ins. Co., 782 F.Supp. at 217. However, the Bank Defendants contend that dismissal of the Linter Defendants from this action would alter the balance of conveniences so as to render Australia the more appropriate forum.

DISCUSSION

I. LINTER DEFENDANTS' MOTION TO DISMISS BASED ON COMITY

On June 1, 1992, this Court

dismissed Linter I as a matter of comity in favor of the Australian liquidation proceedings. Allstate Life Ins. Co., [Current] Fed. Sec. L. Rep. (CCH) ¶ 96, 864. Plaintiffs do not dispute that the same principles of comity that dictated dismissal of Linter I warrant dismissal of Linter II with regard to the Linter Defendants. See Plaintiffs' Memorandum of Law in Opposition to the Linter Defendants' Motion to Dismiss, dated September 9, 1992 ("Plaintiffs' Linter Mem.") at 2.

Plaintiffs nevertheless ask the Court to deny the Linter Defendants' motion to dismiss. They seek this ruling admittedly for the sole purpose of allowing them to obtain discovery from the Linter Defendants as parties. Because the Linter Defendants are in

liquidation, many, if not all, of their former officers and employees are no longer party witnesses.

Moreover, Plaintiffs have failed to present the Court with any authority for the proposition that it may retain jurisdiction of a lawsuit in which it may never render judgment merely to enable the parties to take discovery. They cite one case, In re Gercke, 122 B.R. 621 (Bankr. D.D.C. 1991), in which a court enjoined a breach of contract action in Superior Court of the District of Columbia based upon considerations of comity, but permitted enforcement of a production order previously entered in the case. In re Gercke differs from this case primarily because this case involves no existing production orders that the parties seeking dismissal are trying to

avoid. The Court need not retain jurisdiction for the purposes of ensuring compliance with existing discovery orders.

This Court finds that the considerations of comity supporting the dismissal of Linter I require the dismissal of Linter II as it pertains to the Linter Defendants. Accordingly, the Linter Defendants' motion to dismiss is granted.

II. BANK DEFENDANTS' MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

On January 9, 1992, this Court denied an earlier motion by the Bank Defendants for dismissal of this action on the ground of forum non conveniens. Allstate Life Ins. Co., 782 F.Supp. at 217. The Bank Defendants now ask the Court to reconsider its prior ruling. A district judge may modify interlocutory

orders and rulings made prior to trial at any time before final judgment. In re United States, 733 F.2d 10, 13 (2d Cir. 1984). "[T]here is no imperative duty to follow the earlier ruling --- only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs." Id. (quoting Dictograph Prods. Co. v. Sonotone Corp., 230 F.2d 131, 135 (2d Cir.), petition for cert. dismissed per stipulation, 352 U.S. 883 (1956)). Although jurisprudential concerns "counsel against reopening issues previously decided in an action absent compelling circumstances to justify taking a 'second look,'" Wilder v. Bernstein, 645 F.Supp. 1292, 1310 (S.D.N.Y. 1986), aff'd, 848 F.2d 1338 (2d Cir. 1988), here, the ongoing nature of the Australian liquidation proceedings

and the resulting dismissal of the Linter Defendants from this action present a change in circumstances sufficiently compelling to justify the reconsideration of this Court's earlier ruling.

In its prior decision, the Court set forth the legal standard for dismissal based on forum non conveniens. See Allstate Life Ins. Co., 782 F.Supp. at 223-24. The Court quoted Judge Friendly's admonition that "courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country." Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972)(citation omitted). The Second

Circuit has thus established a high hurdle for the Bank Defendants to clear before this Court will grant dismissal based on forum non conveniens.

This hurdle is not, however, insurmountable. United States citizens do not have an absolute right to sue in American courts. Overseas Nat'l Airways, Inc. v. Cargoluz Airlines Int'l, S.A., 712 F.2d 11, 14 (2d Cir. 1983); Diatronics, Inc. v. Elbit Computers, Ltd., 649 F. Supp. 122, 129 (S.D.N.Y. 1986), aff'd, 812 F.2d 712 (2d Cir. 1987). In particular, American parties who engage in international transactions "cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere."

Diatronics, 649 F.Supp. at 129 (citation omitted). Pursuant to the doctrine of forum non conveniens, the Court in Diatronics dismissed an action similar to this one in that it had been brought by a domestic corporation against a foreign corporation and arose out of the domestic plaintiff's purchase of the foreign defendant's securities. As in this matter, the lawsuit in Diatronics alleged violations of United States securities laws and focused upon an agreement executed and, for the most part, negotiated abroad. Id., at 123, 127-30.[19]

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[19] Diatronics differs from this matter in that the plaintiffs in that case purchased securities pursuant to a private purchase agreement, rather than on the American market, and the purchase agreement provided that the parties would submit to the jurisdiction of the Israeli courts. Diatronics is cited only to show that forum non conveniens has been

This Court previously determined that the Bank Defendants would not suffer any material injustice if forced to try Linter II here. Specifically, this Court refused to dismiss this case in spite of its conclusion that Australia provides an adequate alternative forum and that litigation in Australia "might be somewhat more convenient for the numerical majority of the witnesses involved," might decrease overall expenses, and "would clearly be more convenient for the Bank Defendants." Allstate Life Ins. Co., 782 F.Supp. at 224 & n. 8, 226. The factors weighing in favor of an Australian forum included the location of relevant documents and the

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applied to deprive an American plaintiff of the opportunity to litigate its federal securities claim in its home forum.

residency of the majority of important witnesses, such as employees and former employees of the Bank Defendants and Linter Defendants. Id. at 224-25. The factor weighing heavily against dismissal was the United States' substantial interest "in affording United States citizens a forum, in enforcing the federal securities laws, and in preserving the integrity of markets for securities in the United States." Id. at 225.

The length of time during which the Linter companies have been in liquidation in Australia has created additional burdens for the Bank Defendants so as to warrant dismissal based on forum non conveniens.

First, as liquidation has progressed, the former officers and

employees of the Linter Defendants have ceased to be party witnesses and, as a result, are now beyond the subpoena power of this Court. The officers and employees of the Linter Defendants are central witnesses in this action, in that they are expected to provide testimony as to what the Bank Defendants knew or intended regarding the content of the prospectus at the time of its issuance. The live testimony of key witnesses is particularly important in a case, such as this one, that involves allegations of fraud. See Fustok v. Banque Populaire Suisse, 546 F.Supp. 506, 511 & n. 13 (S.D.N.Y. 1982). Where the plaintiff's case for liability "will depend in large measure upon the knowledge and activities" of certain non-party witnesses, the inability to secur the

attendance of such witnesses by compulsory process weighs in favor of dismissal. See Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976); accord Atalanta Corp. v. Polskie Linie Oceaniczne, 683 F. Supp. 347, 351-52 (S.D.N.Y. 1988).

Second, the ongoing nature of the liquidation proceedings has necessitated the dismissal of the Linter Defendants from this action on the ground of comity.[20] The dismissal of the Linter

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[20] Subsequent to the denial of the Bank Defendants' prior motion to dismiss, the Court examined Plaintiffs' assertions, raised in the context of Linter I, that they were not being treated fairly in the Australian liquidation proceedings. The Court determined that Plaintiffs had failed to show the existence of procedural unfairness in those proceedings and, therefore, had

Defendants eliminates the Bank Defendants' opportunity to pursue cross-claims for contribution against the Linter Defendants in this forum. "The inability to implead other parties directly involved in the controversy is a factor which weights against the retention of jurisdiction in the Southern District of New York." Fitzgerald, 521 F.2d at 453; accord, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 259 (1981); Atalanta Corp., 683 F.Supp. at 352. Although the benefits of impleader "are not so important as to counteract . . . overwhelming evidence" that the plaintiff should be able to sue in its chose forum, they are properly considered in a close

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failed to defeat the Linter Defendants' argument for dismissal of Linter I on the basis of comity.

case, such as this one. Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972). If the Bank Defendants must defend themselves in this forum and then go to Australia to seek contribution for any damages assessed, they risk inconsistent judgments as to the extent of the plaintiffs' losses and of the Linter Defendants' responsibility for those losses.

Plaintiffs argue that the Bank Defendants' inability to implead the Linter Defendants in this forum does not weight in favor of dismissal because the Bank Defendants have no guarantee that they will be able to defend against the plaintiffs' claims and pursue their cross-claims against the Linter Defendants in a single forum in Australia. Australian law provides "that

no action or other civil proceeding may be commenced or proceeded with against a company in liquidation except by leave of the Supreme Court of New South Wales and in accordance with such terms as that court imposes." Declaration of John Dyson Heydon, dated Sept. 21, 1992, ("Heydon Decl.") at ¶ 3 (paraphrasing § 371(2) of the Companies Code of New South Wales).

The Bank Defendants have submitted an expert opinion concluding that:

> An application by the Bank Defendants for leave to file a cross claim for indemnity or contribution against the Linter Companies arising from allegations made against the Bank Defendants similar to those asserted in Linter II would almost certainly be successful.

Id. at ¶ 8. In addition, the recent decision in the Australian equity proceeding that the Bank Defendants' cross-claims for discretionary relief

"might well ultimately be convenient to hear in conjunction with" the Australian Federal Court action indicates that the claims asserted by the parties in this action might be resolved in a single proceeding in Australia. Thus, the Bank Defendants' chances of defending against the plaintiffs' claims and asserting their cross-claims for contribution in a single Australian forum are sufficiently high as to warrant consideration of the benefits of impleader on this motion to dismiss.

The trial of Linter II in this Court is likely to increase the overall costs to all parties of litigation arising out of the sale of the LTCL debentures. On a motion to dismiss on the ground of forum non conveniens, a court may consider the "practical problems that make trial of a

case easy, expeditious and inexpensive." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). When this Court denied the Bank Defendants' previous motion to dismiss, Linter I was still pending in this forum, the Linter Defendants were still parties to this action, and the Court did not have the benefit of the recent decisions in Australia. Subsequent developments have since rendered Australia the only continent on which all claims arising out of the purchase of the LTCL debentures may be litigated. Because trial of the plaintiffs' claims against the Bank Defendants will probably require much of the same evidence that would be presented by the plaintiffs against the Linter Defendants and by the Bank Defendants against the Linter Defendants,

consolidation of these actions on a single continent has the potential to save the parties significant expense and promote economical use of judicial resources.

Accordingly, the balance of conveniences has shifted so that the Bank Defendants now risk substantial prejudice and all parties risk a significant increase in overall expense if this action is tried here rather than Australia. The Bank Defendants' motion to dismiss on the basis of forum non conveniens is granted.

CONCLUSION

For the reasons set forth above, the Linter Defendants' motion to dismiss this action on the basis of comity and the Bank Defendants' motion to dismiss this action on the ground of forum non

conveniens are granted. This entire action is dismissed.

IT IS SO ORDERED.

Dated: New York, New York
December 21, 1992.

\s\ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

§ 77k. Civil liabilities on account of false registration statement

Persons possessing cause of action; persons liable

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a

statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have ben prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Persons exempt from liability upon proof of issues

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall

sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon become aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the

registrations statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the

statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe , at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

Standard of reasonableness

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

Effective date of registration statement with regard to underwriters

(d) If any person become an

underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

Measure of damages; undertaking for payment of costs

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to

which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Joint and several liability

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Offering price to public as maximum amount recoverable

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

May 27, 1983, c. 38, Title I, § 11, 48 Stat. 82; June 6, 1934, c. 404, Title II, § 206, 48 Stat. 907.

§ 771. Civil liabilities arising in connection with prospectuses and communications

Any person who -

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

§ 77v. Jurisdiction of offenses and suits

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No case arising under this subchapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said

person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686; Oct. 15, 1970, Pub.L. 91-452, Title II, § 213, 34 Stat. 923.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(As amended Dec. 4, 1987, Pub.L. 100-181, Title III, § 826, 101 Stat. 1259.)

§ 240.10b-5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sect. 10; 48 Stat. 891; 15 U.S.C. 78j) (13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951.)